(12)

No. 89-156-CFX
Status: GRANTED

Title: Pennsylvania Department of Public Welfare, et al., Petitioners
v.
Edward J. Davenport, et ux.

Docketed:
July 26, 1989

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Koons,Calvin R.

Counsel for respondent: Searles,David A.

Entry	Date	Note	Proceedings and Orders
1	Jul 26 1989	G	Petition for writ of certiorari filed.
2	Aug 24 1989		Brief amicus curiae of Virginia filed.
6	Aug 24 1989	X	Brief of respondents Davenport, et ux. in opposition filed.
7	Aug 24 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
		*	Notarized affidavit in route
5	Aug 25 1989		Brief amici curiae of Connecticut, et al. filed.
3	Aug 30 1989		DISTRIBUTED. September 25, 1989
4	Sep 5 1989	F	Response requested -- JPS.
8	Sep 13 1989		Notarized affidavit received and distributed.
9	Oct 2 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Oct 2 1989		Petition GRANTED.
			**********
11	Oct 20 1989		Record filed.
		*	Certified copy of briefs, appendix and partial proceedings received. (Original record received Oct. 23, 1989).
12	Nov 16 1989		Brief amicus curiae of United States filed.
13	Nov 16 1989	G	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
14	Nov 16 1989	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
15	Nov 16 1989		Brief amici curiae of Alabama, et al. filed.
16	Nov 16 1989		Brief of petitioners PA Dept Pub Welfare, et al. filed.
17	Nov 16 1989		Joint appendix filed.
20	Dec 1 1989	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Dec 4 1989		Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED.
19	Dec 4 1989		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
21	Dec 11 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
22	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1990. (3RD CASE)
23	Jan 5 1990	X	Brief of respondents Davenport, et ux. filed.
24	Jan 18 1990		CIRCULATED.
25	Jan 31 1990	X	Reply brief of petitioners PA Dept Pub Welfare, et al. filed.

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No. 89-156-CFX

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether criminal restitution orders are dischargeable "debts" in proceedings under Chapter 13 of the Bankruptcy Code?

LIST OF PARTIES

Petitioners are the Commonwealth of Pennsylvania, Department of Public Welfare and the Adult Probation and Parole Department of the Court of Common Pleas of Bucks County, Pennsylvania, which joins in this petition pursuant to Supreme Court Rule 19.4.

The respondents are Edward J. and Debora A. Davenport.

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OPINIONS BELOW

The opinion of the Court of Appeals in the consolidated cases is reported at 871 F.2d 421 and is reprinted in the appendix at p. 1a-58a. The opinion of the District Court in Davenport v. Pennsylvania is reported at 89 B.R. 428 (E.D.Pa. 1988) and is reprinted in the appendix at p. 59a-66a. The opinion of the Bankruptcy Court in In re Davenport is reported at 83 B.R. 309 (Bankr. E.D.Pa. 1988) and is reprinted in the appendix at p. 68a-102a.

The District Court opinion in the companion case, Commonwealth of Pennsylvania, Dept. of Public Welfare v. Johnson-Allen, is reported at 88 B.R. 659 (E.D.Pa. 1988) and is reprinted in the appendix at p. 106a-124a. A District Court memorandum on standing is

reported at 81 B.R. 295 (E.D.Pa. 1987) and is reprinted in the appendix at p. 125a-130a. The opinion of the Bankruptcy Court in In re Johnson-Allen is reported at 69 B.R. 461 (Bankr. E.D.Pa. 1987) and is reprinted in the appendix at p. 131a-184a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was filed on March 28, 1989, and petitioners timely petitioned for rehearing. The Court of Appeals denied rehearing on April 27, 1989, Pet.App. 186a-18[illegible] and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

A. Provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

§ 101. Definitions

In this title -

. . . .

(4) "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured....

. . . .

(9) "creditor" means -

(a) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;...

. . . .

(11) "debt" means liability on a claim....

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

. . . .

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty....

§ 1328. Discharge

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) of this title; [debts provided for in the plan, but whose last payment date is after the last payment under the plan] or

(2) of the kind specified in section 523(a)(5) of this title [alimony and support obligation].

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

B. Provisions of the Public Welfare Code of Pennsylvania, Pa.Stat.Ann., tit. 62, §§ 101 et seq. (Purdon Supp. 1989))

§ 481. False statements; investigation; penalty

(a) Any person who, either prior to, or at the time of, or subsequent to the application for assistance, by means of

a wilfully false statement or misrepresentation, or by impersonation or by wilfully failing to disclose a material fact regarding eligibility or other fraudulent means, secures, or attempts to secure, or aids or abets or attempts to aid or abet any person in security assistance, or Federal food stamps, commits a crime which shall be graded as provided in subsection (b).

(b) Any person violating subsection (a) commits the grade of crime determined from the following schedule.

Amount of Assistance or Food Stamps	Degree of Crime
$3,000 or more	Felony of the third degree
$1,500 to $2,999	Misdemeanor of the first degree
$1,000 to $1,499	Misdemeanor of the second degree
$ 999 and under, or an attempt to commit any act prohibited in subsection (a)	Misdemeanor of the third degree

(c) Any person committing a crime enumerated in subsection (a) shall be ordered to pay restitution of any moneys he has received by reason of any false statement, misrepresentation, impersonation, failure to disclose required information or fraudulent means. Restitution ordered under this subsection may be paid in a lump sum, by monthly installments or according to such other

schedule as is deemed just by the sentencing court. Notwithstanding the provisions of 18 Pa.C.S. § 1106(c)(2) (relating to restitution for injuries to person or property) to the contrary, the period of time during which the offender is ordered to make restitution may exceed the maximum term of imprisonment to which the offender could have been sentenced for the crime of which he was convicted, if the sentencing court determines such period to be reasonable and in the interests of justice.

C. Provisions of the Crime Code of Pennsylvania, Pa.Cons.Stat., tit. 18, §§ 101 et seq. (1982).

§ 1106. Restitution for injuries to person or property

(a) General rule.--Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender may be sentenced to make restitution in addition to the punishment prescribed therefor.

(b) Condition of probation or parole.--Whenever restitution has been ordered pursuant to subsection (a) and the offender has been placed on probation or parole, his compliance with such order may be made a condition of such probation or parole.

(c) Authority of sentencing court. -- In determining whether to order restitution as a part of the sentence or as a condition of probation or parole, the court:

(1) Shall consider the extent of injury suffered by the victim and such other matters as it deems appropriate.

(2) May order restitution in a lump sum, by monthly installments or according to such other schedule as it deems just, provided that the period of time during which the offender is ordered to make restitution shall not exceed the maximum term of imprisonment to which the offender could have been sentenced for the crime of which he was convicted.

(3) May at any time alter or amend any order of restitution made pursuant to this section providing, however, that the court state its reasons and conclusions as a matter of record for any change or amendment to any previous order.

. . . .

(e) Restitution payment and records.-- Restitution, when ordered by a judge, shall be made by the offender to the probation section of the county in which he was convicted according to the order of the court.... The probation section shall maintain records of the restitution order and its satisfaction and shall forward to the victim the property or payment made pursuant to the restitution order.

(f) Noncompliance with restitution order. -- Whenever the offender shall fail to make restitution as provided in the order of a judge, the probation section shall notify the court within 20 days of such failure.... Upon such notice of failure to make restitution,... the court shall order a hearing to determine if the offender is in contempt of court or has violated his probation or parole.

(g) Preservation of private remedies. -- No judgment or order of restitution shall debar the owner of the property or the victim who sustained personal injury, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.

(h) Definitions. - As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Crime." Any offense punishable under this title or by a district justice.

"Injury to property." Loss of real or personal property, including negotiable instruments, or decrease in its value, directly resulting from the crime.

"Offender." Any person who has been found guilty of any crime.

"Personal injury." Actual bodily harm, including pregnancy, directly resulting from the crime.

"Property." Any real or personal property, including currency and negotiable instruments, of the victim.

"Restitution." The return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court.

"Victim." Any person, except an offender, who suffered injuries to his person or property as a direct result of the crime.

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,

Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners respectfully ask the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

This case presents the question of whether a criminal restitution order is a dischargeable "debt" within the meaning of the Bankruptcy Code. The Court granted certiorari to resolve this question in Kelly v. Robinson, 479 U.S. 36 (1986), but ultimately found it unnecessary to do so, deciding the case instead on a narrower ground not applicable here. Id., 479 U.S. at 50. This case again presents the issue presented but left unresolved in Kelly.

This case arises under Chapter 13 of the Bankruptcy Code. A debtor who successfully completes a Chapter 13 plan is entitled--with limited exceptions not here relevant--to a discharge of all "debts" as that term is defined in the Bankruptcy Code. 11 U.S.C. § 1328(a). The Code defines a "debt" as "liability

on a claim," and defines a "claim" as a "right to payment." 11 U.S.C. § 101(4), (11). The Court of Appeals held that a criminal restitution order is a "debt" within the meaning of the Bankruptcy Code, and hence dischargeable upon the completion of a Chapter 13 plan.

Kelly v. Robinson, supra, by contrast, arose under Chapter 7 of the Bankruptcy Code. A discharge under Chapter 7, like one under Chapter 13, affects only "debts," but the exceptions to a Chapter 7 discharge are broader than those to a Chapter 13 discharge. Cf. 11 U.S.C. § 727 with 11 U.S.C. § 1328(a). In Kelly, the Court held that one of those exceptions--codified at 11 U.S.C. § 523(a)(7)--excluded criminal restitution orders from a Chapter 7 discharge, Kelly, 479 U.S. at 50, and therefore found it unnecessary

to reach the broader question of whether such orders are "debts" in the first place. This case presents that issue.

1. The respondents, Edward and Debora Davenport, pled guilty to the crime of welfare fraud. See Pa.Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989); Pet.App. 5a. Each was sentenced to one year of probation; each was ordered to make restitution in the amount of $2,072.40 at the rate of $208.00 per month. Respondents were to send their payments to petitioner, Bucks County Adult Probation and Parole Department ("Probation Department"), which, in turn, was to forward restitution to one victim of the crime, petitioner, Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"). DPW would then share repayments with the federal government. See Pa.Stat.Ann., tit. 62, § 474 (Purdon 1968).

Instead of making any restitution payments, the Davenports filed a voluntary petition in bankruptcy under Chapter 13 in the United States Bankruptcy Court for the Eastern District of Pennsylvania. See 11 U.S.C. § 1301 et seq. The petition contained a schedule of creditors that listed, among others, DPW as having an unsecured debt based upon "public assistance overpayment." (C.A. App. 14).

Under the Davenports' Chapter 13 plan, all unsecured creditors were treated the same. When that treatment resulted in failure to make any restitution payments, the Probation Department began probation violation proceedings. The Davenports responded by filing an adversary proceeding in bankruptcy, against DPW and the Parole Department, to obtain a declaration that

the restitution order was a discharge-able "debt" and an injunction prohibiting the Probation Department from taking any further steps to collect the restitution. (C.A.App. 28).

2. The Bankruptcy Court held that a criminal restitution order was a dischargeable "debt" under Chapter 13 of the Bankruptcy Code and ordered that any payment made by the debtor be returned to the trustee in bankruptcy. In re Davenport, 83 B.R. 309 (Bankr. E.D. Pa. 1988), Pet. App. 70a et seq. The Davenports successfully completed their Chapter 13 plan, and the Bankruptcy Court discharged their debts. Pet. App. 8a.

The District Court reversed, holding that the restitution order was not a "debt." The District Court reasoned that discharge of restitution

orders would violate the important principles of federalism discussed in Kelly v. Robinson, supra, and also held that the victim of the crime--DPW--did not possess a "right to payment" of the restitution, which is a prerequisite to the existence of a "debt" under the Code. Pet. App. 59a-66a.

3. The Court of Appeals reversed and remanded with directions to affirm the order of the Bankruptcy Court. Pet.App. 1a-58a. The Court of Appeals conceded that the majority of bankruptcy courts considering the issue have rejected the contention that a criminal restitution obligation is a "debt" under that Bankruptcy Code; recognized that in Kelly this Court declared that it had "serious doubts" as to whether Congress intended criminal

restitution orders to constitute "debts"; and went so far as to state that "facially there is considerable merit" to arguments against treating them as such. Pet. App. 17a-19a.

Nevertheless, the Court of Appeals held that such orders are dischargeable debts. The Court of Appeals relied upon the idea that Congress intended the broadest possible definition of the word "debt," holding that the victim's right to obtain a civil judgment and the Probation Department's right to enforce the restitution order satisfied the Code's "right to payment" requirement. Pet. App. 23a-26a.

The Court of Appeals added that its decision "comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for

straight liquidation under Chapter 7." Pet. App. 31a. The Court of Appeals emphasized the broader discharge available under Chapter 13. "Although Congress did incorporate into Chapter 13 one of the ten exceptions under section 523(a) it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution." Pet.App. 38a.

Despite noting this Court's "admonition that 'the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief.' Kelly, 479 U.S. at 49" (Pet.App. 40a), the Court of Appeals found that Congress, not the court, must

"cure any perceived 'defects' in [the Bankruptcy Code]"; defects "which arguably affect state criminal proceedings." Pet. App. 40a.

Judge Hutchinson dissented. Pet.App. 43a-58a. He wrote that "the concerns which prompted the Supreme Court's reservations [in Kelly] require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy." Pet. App. 45a. The broader discharge provisions of Chapter 13 do not, in his view, alter this basic conclusion. Pet. App. 58a, n.5.

4. In the Court of Appeals, this case was consolidated with two other cases in which the District Court had likewise held restitution orders not

to be dischargeable "debts." In neither case had those debtors, unlike the Davenports, yet completed their Chapter 13 plans or received a discharge.

The Third Circuit consolidated these cases with Davenport but disposed of them differently, holding that the dischargeability issue was not "ripe for resolution until the plan has been concluded and it is known which discharge provision[1] will apply." Pet. App. 12a-13a; citing In re Heincy, 858 F.2d. 548, 550 (9th Cir. 1988). Because of

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[1]A Chapter 13 debtor who successfully completes the plan, like the Davenports, would be entitled to a discharge under 11 U.S.C. § 1328(a). One who did not could only obtain a discharge under Section 1328(b). A Section 1328(b) discharge would, for these purposes, be identical to a Chapter 7 discharge--see 11 U.S.C. § 523(a)--and would be governed by Kelly v. Robinson. Pet. App. 12a.

this disposition, the debtors in those cases--Loraine Johnson-Allen and Ruby Steffler--are not named as respondents. The petitioners do not seek review of the decision in their cases, but the lower court opinions are included in the Appendix for the sake of completeness.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erroneously Decided an Important Question of Federal Law, Relating to the Administration of State Criminal Justice Systems, That Has Not Been, But Should Be, Decided by This Court

1. Reduced to its essence, the question in this case is whether Congress intended to allow convicted criminals to escape or minimize punishment by completing a Chapter 13 bankruptcy plan. The resolution of this issue will have a significant impact on the ability of federal and state governments to fashion punishment that meets the crime. See Brief of Amicus Curiae in Support of Petition. Restitution, "a central feature of victims' rights efforts in

America,"[2] is mandated in "twenty-seven states . . . unless the judge provides the justifications for not doing so,"[3] must be considered as a sentencing option in thirty states,[4] and is permitted in all states.[5] In Pennsylvania alone, the Court of Appeals' interpretation of the Bankruptcy Code will annually render unenforceable in excess of 5,000 criminal sentences of restitution--if

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[2]McGillis, Crime Victim Restitution: An Analysis of Approaches, (National Institute of Justice, J.S. Dept. of Justice, December, 1986), p. iii.

[3]Comment, Criminal Restitution as a Limited Opportunity, 13 New Eng. J. Crim. & Civ. Confinement 243, see n. 9.

[4]See id. at 243-244.

[5]Id.

the criminal chooses to file a Chapter 13 bankruptcy.[6]

This Court has often recognized the importance of the States' interest in administering their criminal justice systems free from federal interference, Younger v. Harris, 401 U.S. 42, 44-45 (1971), observing that this state interest is "one of the most powerful of the considerations that should influence a court considering equitable types of relief." Kelly v. Robinson, 479 U.S. 36, 49 (1986); United States v. Ron Pair Enterprises, Inc., No. 87-1043, slip op. at 8-9 (February 22, 1989).

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[6]In 1987, sentencing courts in Pennsylvania imposed restitution sentences in over 5,000 criminal cases according to statistics filed by the District Attorneys' Association of Pennsylvania with the Court of Appeals.

In Kelly, the Court recognized the potentially devastating effect on the criminal justice system of making criminal restitution dischargeable. Id., 479 U.S. at 46. The Court was concerned that state prosecutors would have to defend state criminal judgments in federal bankruptcy court, id. at 48; that bankruptcy courts could remit judgments imposed by state criminal judges, id. at 49; and that state sentencing judges' flexibility in fashioning the most appropriate criminal sentence would be restricted. Ibid. Accord, Pet. App. 54a-55a, n. 4, (Hutchinson, J., dissenting.) The Court of Appeals' decision allowing for dischargeability of criminal restitution makes the Court's concerns a reality.

In reaching its conclusion, the Court of Appeals misconstrued the statute, disregarded the views of the Kelly majority, and reached a decision at odds with those of other courts around the country.

2. The starting point in every case involving statutory construction is the language itself. Kelly, 479 U.S. at 43. The Code defines a "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim" as a "right to payment." 11 U.S.C. § 101(4). A "creditor" is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(9).

Whether a "right to payment" exists is a question of state law. In re Frenville, 744 F.2d 332, 337 (3d Cir.

1984), cert. denied, 469 U.S. 1160 (1985). The Court of Appeals acknowledged that under Pennsylvania law an order of restitution does not establish a debtor-creditor relationship. Pet. App. 21a-22a. In Pennsylvania, restitution is not paid directly to the victim. Rather it is paid to the probation office. Pa. Cons.Stat.Ann., tit. 18, § 1106(e) (Purdon). Moreover, the victim cannot enforce the criminal restitution order -- only probation officers can initiate enforcement proceedings. 18 Pa.Cons.Stat. Ann. § 1106(f). Pennsylvania law does not authorize seizure of a debtor's property by probation officers and unlike provisions under the Model Penal Code § 302.2, unpaid amounts are not automatically collectible as civil judgments.

Pennsylvania's criminal restitution scheme is thus similar to the Connecticut scheme which the Court described in Kelly:

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Kelly, 479 U.S. at 41, quoting In re Pellegrino, 42 B.R. 129, 133 (Bankr. D.Conn. 1984)(the companion case to Kelly).

The Court of Appeals apparently agreed that the victim does not possess a "right to payment" of the criminal restitution, but implied that the victim's right to payment of a civil claim satisfied that requirement. Pet. App. 21a-24a. Moreover, the Court of

Appeals held that the Probation Department's ability to enforce the obligation constituted a right to payment.

Following the analysis of the Second Circuit in In re Robinson, 776 F.2d 30 (3d Cir. 1985), rev'd sub nom; Kelly v. Robinson, 479 U.S. 36 (1986), rejected by this Court, the Court of Appeals--purportedly to protect victims--blurred the distinction between civil and criminal restitution. Of course, victims of crimes have common law and statutory rights to seek compensation directly from criminals and may file claims in bankruptcies. See Pa.Stat.Ann., tit. 18, § 1106(g). These facts, however, are independent from the incidental benefit received by a victim when a criminal sentence of restitution is entered. The enforceable civil right to payment is not a right to payment of the criminal order.

Nor does the Probation Department have a "right to payment" merely because it can institute probation violation proceedings. These facts alone, wholly apart from the other factors discussed below, make it apparent that the Court of Appeals' conclusion that a "right to payment" exists strained the plain language of the Bankruptcy Code.

2. The language should only have been the starting point of the Court of Appeals' analysis. The Court has held that the statutory definition of debt must be read "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." Kelly, 479 U.S. at 43-44. After doing just that, the Court expressed its "serious doubts" as to

whether Congress intended to make criminal penalties "debts," id. at 50, noting, that "nothing in the legislative history of these sections compels the conclusion of Congress intended to change the state of the law with respect to criminal judgments." Id. at 50, n. 12.

The Court of Appeals, however, declining to follow the Court's analysis of this issue, dismissed the Court's doubts as "founded upon factors other than the plain language of the statute." Pet. App. 26a-27a. The Court of Appeals preferred instead to rely upon the Second Circuit's decision in In re Robinson, rejected by this Court, and upon the dissent in Kelly.

3. Ironically, the Court of Appeals sought support for its holding from Kelly itself, arguing that the

holding in Kelly--that restitution orders are exempted from discharge--"compels the conclusion that restitution is a debt." Pet. App. 29a. This is supposedly so because only debts are subject to discharge and if "criminal" penalties were not debts there would be no need to except them from discharge. Pet. App. 29a, citing Kelly v. Robinson, 479 U.S. 36, 58 (Marshall, J. dissenting).

This argument does not square with the language of Kelly where the majority stated "we need not address that question in this case." Id. at 50. If one concludes otherwise, the Kelly decision becomes double talk--saying one thing and doing another. Surely, the Court was aware of the argument made by

the dissent when it expressed its "serious doubts" as to criminal restitution being a debt and the reasons behind those doubts and did not do so meaninglessly.

II. The Ruling of The Court Below Creates A Conflict Among the Circuits and Lower Federal Courts

The Third Circuit's decision stands in conflict with the approach taken by other Courts of Appeals. In United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982), for example, the Fifth Circuit found "untenable on its face" the notion that a prior discharge in bankruptcy of a debt created by a defendant's bank fraud prevented a federal criminal court from ordering the defendant, as a condition of his suspended sentence, to make restitution to the bank. On nearly identical facts, the Seventh Circuit reached the same conclusion. United States v. Alexander, 743 F.2d 472, 480 (7th Cir. 1984)("The bankruptcy proceeding is largely unconcerned with criminality.")

Other circuit courts have held that absent extraordinary circumstances a federal court should not enjoin state criminal proceedings that may result in a restitution order requiring the defendant to pay back a debt that may be discharged at the conclusion of pending bankruptcy proceedings. McDonald v. Burrows, 731 F.2d 294, 297-99 (5th Cir.), cert. denied, 467 U.S. 852 (1984); Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982).

Nondischargeability of criminal restitution is implicit in each of these circuit decisions and their approach therefore conflicts with the Third Circuit decision.

As the Third Circuit itself acknowledged, its decision that restitution is a debt also conflicts with the

majority of federal bankruptcy courts to have addressed the issue.[7] Pet. App. 17a. This Court should grant certiorari to resolve the conflict.

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[7]See In re Norman, 95 B.R. 771 (Bankr. D. Colo. 1988), and In re Johnson, 32 B.R. 614 (Bankr. D. Colo. 1983) (applying Colorado law in Chapter 13 bankruptcies); In re Magnifico, 21 B.R. 800 (Bankr. Ariz. 1982)(applying Arizona law in a Chapter 7 case); In re Oslager, 46 B.R. 58 (Bankr. M.D.Pa. 1985)(applying Pennsylvania law to a Chapter 7 case); In re Kohr, 82 B.R. 706 (Bankr. M.D.Pa. 1988)(applying Pennsylvania law to a Chapter 13 case); In re Pellegrino, 42 B.R. 129 (Bankr. D.Conn. 1984); In re Mead, 41 B.R. 838 (Bankr. D. Conn. 1984); and Robinson v. McGuigan, 45 B.R. 423 (Bankr. D.Conn. 1984)(applying Connecticut law to Chapter 7 bankruptcies) Cf. cases from states where a statutory right to payment exists for victims entitled to restitution: In re Heincy, 78 B.R. 246 (9th Cir. B.A.P.Cal. 1988), rev'd, 858 F.2d 548 (9th Cir. 1988)(applying California law in Chapter 13), and In re Newton, 50 B.R. 708 (Bankr. N.D.Ga. 1987)(applying Georgia law in Chapter 13 to conclude that restitution is a debt, but is nonetheless not subject to discharge.)

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1610

IN RE: LORRAINE JOHNSON-ALLEN

Commonwealth of Pennsylvania
Department of Public Welfare

v.

Lorraine Johnson-Allen

IN RE: RUBY STEFFLER a/k/a
INGRID J. STEFFLER

Commonwealth of Pennsylvania
Department of Public Welfare

v.

Ruby Steffler a/k/a
Ingrid J. Steffler
Lorraine Johnson-Allen and
Ruby Steffler,

Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
Civil No. 87-1032

NO. 88-1635

IN RE: EDWARD AND DEBORA DAVENPORT

Edward and Debora Davenport

v.

Commonwealth of Pennsylvania,
Department of Public Welfare and Court
of Common Pleas of Bucks
County, and Edward Sparkman, Trustee

Edward and Debora Davenport,
Appellants

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
Civil No. 88-3177

Argued December 12, 1988
Before: GIBBONS, Chief Judge,
HUTCHINSON and ROSENN,
Circuit Judges

Opinion Filed March 28, 1989

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OPINION OF THE COURT

ROSENN, Circuit Judge.

These consolidated appeals raise an important issue, particularly for governmental agencies engaged in public assistance, of whether criminal restitution imposed as a penalty for welfare fraud constitutes a debt dischargeable under Chapter 13 of the Bankruptcy Code, 11 U.S.C.A. § 1301, et seq. (West 1979 & Supp. 1988). The bankruptcy court, in two separate

opinions, held that restitution obligations constitute dischargeable debts under Chapter 13. Appellees, the Pennsylvania Department of Public Welfare (DPW) and the Court of Common Pleas of Buck County, Adult Probation and Parole Department, (collectively, the State), appealed, and the United States District Court for the Eastern District of Pennsylvania reversed. Debtors appealed to this court.[1] We reverse the judgments of the district court.

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[1]This court has jurisdiction over the appeals by virtue of its authority to review final orders of the district court in accordance with 28 U.S.C. § 158(d).

I.

The facts in these cases are not in material dispute. On September 17, 1985, the Davenports entered guilty pleas to the crime of welfare fraud in Bucks County, Pennsylvania Common Pleas Court. Each was sentenced to one year probation and was ordered to make criminal restitution payments of $208 per month, beginning in December 1986, until a total of $2,072.40 had been remitted. Payments were to be sent to the County Probation Department which, in turn, was to forward them to the DPW.

On May 25, 1987, the Davenports filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The criminal restitution obligation, listed as an unsecured debt payable to the DPW, was to receive treatment equal to other

unsecured creditors under the plan. When the Davenports failed to make restitution payments as originally ordered, the Probation Department commenced violation of probation proceedings. The Davenports notified the Probation Department on July 20, 1987, of the pending bankruptcy proceeding, and requested withdrawal of the probation violation charges. When the Probation Department refused to withdraw the charges, the Davenports commenced an adversary action in the bankruptcy court seeking a declaration as to the dischargeability of the criminal restitution obligation.

On October 20, 1987, the bankruptcy court confirmed the Davenports' Chapter 13 plan without objection from any creditor and with the express approval of the standing Chapter

13 trustee. On October 19, 1987, the Probation Department proceeded with a violation of probation hearing in Bucks County. The Common Pleas Court denied the motion to revoke probation, declaring that the restitution order "still stands."

Following trial on the issue of dischargeability, the bankruptcy court held that the restitution obligation was dischargeable under Chapter 13. In re Davenport, 83 B.R. 309 (Bankr. E.D. Pa. 1988). On appeal, the district court reversed, holding that the restitution obligation was not a debt as defined by the Bankruptcy Code, and that a discharge would violate principles of federalism as enunciated in Younger v. Harris, 401 U.S. 37 (1971). Davenport v. Pennsylvania, 89 B.R. 428 (E.D. Pa. 1988). On

July 8, 1988, after successfully completing their Chapter 13 plan, the bankruptcy court discharged the Davenports under Chapter 13, 11 U.S.C.A. § 1328(a).

In a separate prosecution, Lorraine Johnson-Allen pleaded guilty in a state court to four counts of welfare fraud on June 18, 1985. The court subsequently sentenced her to probation and ordered restitution of $6,300 which was to be paid in ten dollar monthly installments. Johnson-Allen continued payments until she filed her bankruptcy petition under Chapter 13 on March 14, 1986. Like the Davenports' plan, Johnson-Allen's Chapter 13 plan listed the DPW as an unsecured creditor and provided for payments to be paid to the DPW in amounts equal to all other general unsecured creditors. Johnson-Allen advised the DPW and the Philadelphia County Probation Department of

the filing, stating that she believed, on advice of counsel, that the filing stayed collection of the restitution obligation and that the obligation would be discharged upon completion of the plan payments. On advice from the Probation Department that the payments were not stayed, Johnson-Allen resumed payments pending disposition of this proceeding. On February 11, 1987, no objections having been filed, the bankruptcy court confirmed Johnson-Allen's plan. No one appealed from the confirmation of the plan.

In a third prosecution in a state court, Ruby Steffler also pleaded guilty to welfare fraud on January 17, 1984. The court placed her on probation and ordered her to make restitution in the amount of $5,506.64, in payments of twenty dollars per month. Steffler also

filed a bankruptcy petition under Chapter 13, listing the DPW as an unsecured creditor and accorded the DPW treatment equal to that of the other unsecured creditors. Shortly after filing, she informed the County Probation Department that she would cease restitution payments. However, upon institution of violation of probation proceedings, Steffler resumed her payments. On May 15, 1987, the bankruptcy court confirmed, without objection, her Chapter 13 plan, and no creditor appealed from the confirmation order.

The bankruptcy court consolidated the Steffler and Johnson-Allen proceedings. The court granted summary judgment for both debtors, holding that the restitution obligations were dischargeable under Chapter 13. In re Johnson-Allen, 69 B.R. 461 (Bankr. E.D.

Pa. 1987). On appeal, the district court reversed, again holding that discharge would interfere with the well-established principles of comity and federalism stated in Younger. Pennsylvania Dept. of Public Welfare v. Johnson-Allen, 88 B.R. 659 (E.D. Pa. 1988).

II.

The threshold issue in this case is whether the dischargeability issue is ripe for determination. If a debtor completes payments under the Chapter 13 plan, discharge of debts is controlled by 11 U.S.C.A. § 1328(a). As discussed infra at Section III B, such discharge would encompass restitution obligations. However, if the debtor fails to complete payments, section 1328(b) controls which would preclude discharge of the restitution order. See Kelly v. Robinson, 479 U.S. 36, 53 (1986). The Court of Appeals for the Ninth Circuit recently held under similar facts that the dischargeability issue is not ripe for resolution until the plan has been concluded and it is

known which discharge provision will apply. In re Heincy, 858 F.2d 548, 550 (9th Cir. 1988); see also In re Carroll, 61 B.R. 178, 179 (Bankr. D. Ore. 1986).

We adopt the reasoning of the Ninth Circuit. Because neither Steffler nor Johnson-Allen has completed the Chapter 13 plan, the issue of dischargeability is not ripe, and we will therefore reverse and remand to the district court with directions to dismiss their appeals without prejudice for lack of an appealable order. However, because the Davenports have completed payments under their Chapter 13 plan and have received a discharge of their debts under 11 U.S.C.A. §1328(a), the dischargeability issue is ripe for resolution by this court. We therefore turn now to the merits of that issue with respect to the Davenports' claims.

III.

The critical issue before this court -- whether the restitution obligation is a dischargeable debt -- is comprised of two separate and distinct sub-issues. First, whether the restitution obligation constitutes a debt under the Code? Second, assuming the obligation is a debt, whether that debt is dischargeable under Chapter 13 upon completion of payments under the plan? Because resolution of these issues involves questions of law, our review is plenary.

A.

The Bankruptcy Code defines a "debt" as a "liability on a claim," and further defines a claim as "a right to payment." 11 U.S.C.A. §§ 101(11), 101(4)

(West 1979).[2] In determining whether an obligation constitutes a claim within the meaning of the Code, Congress advised that the definition of claim is to be given the

> broadest possible definition . . . that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

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[2]The Code defines a claim as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C.A. § 101(4).

H. Rep. No. 595, 99th Cong., 2d Sess. 309, reprinted in 1978 U.S. Code Cong. & Admin. News at 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, reprinted in 1978 U.S. Code Cong. & Admin. News 5785, 5807-08. This advice has been well taken by the courts. See, e.g., Ohio v. Kovacs, 469 U.S. 274, 279 (1985); In re Remington Rand Corp., 836 F.2d 825, 829 (3d Cir. 1988). In addition, Congress intended the concepts of "claim" and "debt" to be coextensive. See House Report at 310, reprinted in U.S. Code Cong. & Admin. News at 6267; Senate Report at 23, reprinted in 1978 U.S. Code Cong. & Ad. News at 5809; see also In re Robinson, 776 F.2d 30, 36 (2d Cir. 1985), rev'd on other grounds sub nom. Kelly v. Robinson, 479 U.S. 36 (1986); Kelly, 479 U.S. at 58 (dissent).

Notwithstanding the overwhelming acceptance of the broad nature of the term "claim," the majority of bankruptcy courts have rejected the contention that restitution obligations are "debts" within the meaning of the Code. See, e.g., In re Kohr, 82 B.R. 706, 712 (Bankr. M.D. Pa. 1988); In re Thompson, 77 B.R. 646, 648 (Bankr. E.D. Tenn. 1987); In re Oslager, 46 B.R. 58, 62 (Bankr. M.D. Pa. 1985); In re Pelligrino, 42 B.R. 129, 132 (Bankr. D. Conn. 1984); In re Johnson, 32 B.R. 614, 616 (Bankr. D. Colo. 1983); In re Button, 8 B.R. 692, 694 (Bankr. W.D.N.Y. 1981). Without resolving the issue, the Supreme Court recently lent this position some credence when it declared that it had "serious doubts" as to whether Congress intended restitution obligations to constitute debts. Kelly, 479 U.S. at 50.

The conclusions drawn by the foregoing bankruptcy courts rest primarily upon combinations of five different arguments relating both to the definition of debt and to dischargeability of criminal penalties. Those arguments include: (1) the victim does not personally possess a right to the restitution payment as ordered by the court; (2) a discharge of restitution interferes with state criminal proceedings, violating well-established principles of federalism; (3) Congress revised the Code in 1978 against the background of a judicially created exception for the discharge of criminal penalties; (4) discharge of the restitution obligation would create a "haven for criminals" in contravention of congressional intent; and (5) restitution is intended primarily to rehabilitate the offender and not to

compensate the victim. Although we agree that facially there is considerable merit to these arguments, we are constrained to disagree with the ultimate conclusion that the restitution obligation is not a debt under the Code.

As with any statutory interpretation, we begin with the plain language of the statute. The State properly observes that, under the terms of the Code, the restitution obligation is not considered a "claim" or "debt" unless that obligation creates a right to payment. Under Pennsylvania's restitution statute, where a person is convicted for stealing, converting, or otherwise unlawfully obtaining property, the court is authorized to order restitution in addition to any other punishment properly prescribed for the

crime. 18 Pa.C.S.A. § 1106(a) (Purdon 1983). The statute, which specifically defines restitution as "[t]he return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court," limits the amount of restitution to "the return of the actual property or its undisputed dollar amount." 18 Pa.C.S.A. §§ 1106(d), 1106(h). If the victim receives any civil award, that award must be reduced by the amount paid under the criminal judgment. 18 Pa.C.S.A. § 1106(g). However, unlike a civil award, restitution payments are made directly to the probation department, not to the victim, and the Department then forwards those payments to the victim. 18 Pa.C.S.A. § 1106(e). Furthermore, the restitution statute grants the probation department sole

authority to institute judicial proceedings for the enforcement of the restitution order. 18 Pa.C.S.A. §§ 1106(f).

The State contends that the enforcement provision, which denies the victim any authority to enforce the criminal order, compels the conclusion that the victim has no right to payment of the restitution order and that the order does not, therefore, create a debt. Although, as mentioned, this argument has found favor in many bankruptcy courts, see supra at 9, and also in the Superior Court of Pennsylvania where in Commonwealth v. Mourar, 349 Pa. Super 8583, 504 A.2d 197, 208 (Pa. Super. 1986), vacated and remanded for further proceedings, 517 Pa. 83, 534 A.2d 1050 (1987), the court held that an order of restitution does not create a debtor-creditor relationship between the

offender and victim, we are unable to agree that this rationalization may be applied to the Bankruptcy Code.

As noted, Congress intended the concept of "claim," and, by association, the concept of "debt," to be given the "broadest possible definition." "Where the language of the statute is clear, 'only the most extraordinary showing of contrary intentions' justify altering the plain meaning of a statute." Malloy v. Eichler, 860 F.2d 1179, 1183 (3d Cir. 1988) (quoting Garcia v. United States, 469 U.S. 70, 75 (1984)). By focusing solely on the offender-victim relationship, however, both the DPW and the courts above unduly restrict those definitions. Even the Superior Court in

Commonwealth v. Mourar, supra, recognized that although "the victim cannot enforce the order of restitution . . . he could execute upon a civil judgment." Id. at 208. The only limitation imposed by the language of the Bankruptcy Code is that the obligation must give rise to a "right to payment." There is no requirement that that right be enforceable by any particular person or entity. Nor does the statute mandate such a restriction.

As the Court of Appeals for the Second Circuit noted under similar facts, the language of section 101(4) and the legislative history of the Code indicate that "Congress intended 'claim' to encompass any right held by any person or entity to enforce any money obligation of the debtor." To hold otherwise would "produce the anomalous

result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distribution of the debtor's assets in liquidation. In re Robinson, 776 F.2d at 35-36. That court ultimately concluded that "any right to the payment of restitution is a claim within the meaning of the Code; and that if any person or entity has a right to receive a payment of restitution from the bankruptcy debtor, the obligor has a debt within the meaning of the Code." Id. at 36; see also Kelly, 479 U.S. at 58 (dissent); In re Heincy, 78 B.R. 246, 248-49 (Bankr. 9th Cir. 1987)(restitution obligation constitutes debt within meaning of Code), rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988); In re Cancel, 85 B.R. 677, 678 (Bankr. N.D.N.Y. 1988) (same); In re Cullens, 77

B.R. 825, 828 (Bankr. D. Colo. 1987) (same); In re Brown, 39 B.R. 820, 822 (Bankr. M.D. Tenn. 1984) (same).

We find the reasoning of the Court of Appeals in In re Robinson, supra, persuasive and conclude that the restitution obligation constitutes a debt so long as any person or entity has a right to enforce that obligation. Here, regardless of whether the victim, the DPW, may enforce the order of restitution, there is no question that the Probation Department may enforce the obligation through the institution of violation of probation proceedings. 18 Pa.C.S.A. § 1106(f). Certainly there can be no greater enforcement mechanism than the threat of revocation of probation and the imposition of incarceration. See In re Robinson, 776

F.2d at 38. Moreover, as the court observed in In re Robinson, 776 F.2d at 35-36, the interpretation suggested by the State would lead to the incredible result that an order of restitution in a state criminal proceeding would preclude the victim's participation in the bankruptcy proceeding or recovery of any distribution under the debtor's plan of arrangement. We conclude, therefore, that because the debtors here have incurred a very real obligation to which the Probation Department holds a right to payment within the meaning of section 101(4) of the Code that obligation constitutes a "debt" under the Code.

Although the Supreme Court in reviewing the Court of Appeals' decision in In re Robinson expressed doubt as to whether the restitution obligation is a debt, that doubt is founded upon factors

other than the plain language of the statute. See Kelly, 479 U.S. at 43-44. Specifically, the concerns of the Court, which we will address more fully with respect to the issue of discharge-ability, are based upon "the history of bankruptcy court deference to criminal judgments" and "the interests of the States in unfettered administration of their criminal justice systems." Id. We believe, however, particularly in light of the Court's conclusion in Kelly, that neither of these concerns alters the conclusion that a restitution obligation is a debt.

In Kelly, the Supreme Court held, without deciding the debt issue, that a restitution obligation is not dischargeable under Chapter 7 because that chapter specifically protects from discharge "any debt"

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.

479 U.S. at 53 (quoting 11 U.S.C.A. § 523(a)(7)). The Court determined that this provision was plainly intended to codify the judicially created rule that criminal penalties are not dischargeable. As the Court stated, "Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines." Id. at 51. Finding that restitution focuses primarily on rehabilitation and punishment, rather than upon compensation for the actual loss of the victim, the Court concluded that Congress excepted restitution obligations from discharge under Chapter 7 by virtue of section 523(a)(7).

Addressing the issue left unanswered by the Court, Justice Marshall, in dissenting, further illuminated the Court's analysis of the dischargeability issue, when he stated that it compels the conclusion that restitution is a debt. Noting that only debts are subject to discharge under the Code, Justice Marshall reasoned that if restitution orders and other criminal penalties were not debts, there would be no need to except them from discharge under Chapter 7. Kelly, 479 U.S. at 58. We find this reasoning persuasive and conclude that Congress must have recognized that such obligations were debts within the meaning of the Code. See Kelly, 479 U.S. at 58 (dissent); In re Heincy, 78 B.R. at 248; In re Cullens, 77 B.R. at 828.

The Court's analysis in Kelly also provides an apt response to the argument that criminal restitution is not a debt when such restitution is ordered primarily to rehabilitate the offender rather than to compensate the victim. As the Court held, section 523(a)(7) excepts from discharge criminal restitution precisely because that penalty is imposed primarily for punitive and rehabilitative purposes, and only incidentally for purposes of compensating the victim. The statutory exception to discharge logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such penalties are debts despite the underlying motivations of punishment and rehabilitation. Therefore, we hold that restitution obligations constitute debts even when

the state's primary objectives in imposing such obligations are to rehabilitate and to punish the offender, rather than to compensate the victim.

The conclusion that criminal restitution constitutes a debt under the Code is consistent not only with the statutory scheme, but also comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7.[3]

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[3]The dissent relies on the dicta in Kelly to reach a contrary conclusion because the majority has not referred to any specific legislative history which demonstrates that Congress intended to include criminal restitution orders within the meaning of "debt." The dissent's approach, however, elevates the legislative history of a statute, or its absence thereof, over the plain language of that statute. It is well-

(FOOTNOTE CONTINUED ON NEXT PAGE)

House Rep. at 227, reprinted in 1978 U.S. Code Cong. & Admin. News at 6077. If restitution obligations were not part of the Chapter 13 plan, payments in restitution conceivably could deplete all the debtor's resources before any

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(FOOTNOTE CONTINUED)

established that "[i]f the language is clear and unambiguous, and there is no 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" National Freight, Inc. v. Larson, 760 F.2d 499, 503 (3d Cir.), cert. denied, 474 U.S. 902 (1985) (quoting Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Here, the broad, inclusive language of the statute is clear. To exclude restitution orders from the definition of "debt" would create an exception that Congress did not intend.

Moreover, as we have noted above, the scheme under the new Bankruptcy Code is plainly consistent with the conclusion that criminal restitution is a debt for purposes of Chapter 13 and carries out the congressional intent of encouraging debtors to opt for arrangements under Chapter 13 rather than liquidation under Chapter 7.

distribution is made to the other creditors. As a result, creditors would be more reluctant to confirm such a plan, making the Chapter 13 option entirely unavailable to some debtors. Such a result is contrary to Congress' objective of expanding the availability of the Chapter 13 option. Therefore, both the language of the statute and the intent of Congress support the conclusion that the criminal restitution obligation is a debt under the Code.

In response to the conclusion that criminal restitution is a debt, the State also relies on the legislative history of the Code, focusing on Congress' statement that "[t]he bankruptcy laws are not a haven for criminal offenders." Senate Rep. at 51, reprinted in 1978 U.S. Code Cong. & Admin. News at 5837; House Rep. at 342,

reprinted in U.S. Code Cong. & Admin. News at 6299. Although many courts have attached significance to this statement as support for the conclusion that restitution obligations are not debts, see, e.g., In re Pelligrino, 42 B.R. at 234; In re Johnson, 32 B.R. at 616, we find this argument unpersuasive. As an initial matter, we note that Congress intended the comment as an explanation for the "criminal proceedings" exception to section 362 which otherwise automatically stays all actions pending disposition by the bankruptcy court. 11 U.S.C.A. § 362. Nowhere in the discussion of either claim or debt, however, does Congress express a similar intention to restrict those definitions to exclude obligations arising from criminal penalties.

Moreover, the lack of such restrictions respecting the definitions of "claim" or "debt" is not remarkable. As discussed, Congress intended those concepts to be accorded broad and sweeping definitions. The language of the statute reflects that intention, employing inclusive, rather than exclusive, language. On the other hand, Congress elsewhere restricted application of the Code to exclude obligations arising from criminal penalties. Most notable of these exceptions is the exception to discharge for penalties and fines as provided in section 523, discussed infra at Part B. Therefore, because Congress has effectuated its policy of preventing the Code from becoming a "haven for criminals" by adopting appropriately restrictive language for specific provisions of the Code, such as sections

362(b) and 523(a), its silence on this subject with respect to other provisions is equally telling and may not be discounted. See In re Robinson, 776 F.2d at 37-38; In re Heincy, 78 B.R. at 248. We thus decline to second-guess Congress and refuse to insinuate language into its legislation excepting criminal penalties from the definitions of "claim" or "debt."

Having concluded that restitution obligations are debts within the meaning of the Code, we turn now to the issue of whether such debts are excepted from discharge under Chapter 13.

B.

Upon completion of payments under the repayment plan, Chapter 13 requires the court to discharge all debts provided for in the plan with only

two exceptions. Neither of the exceptions, however, pertains to penalties such as criminal restitution.[4] Because the plain language of the chapter does not except from discharge debts for

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[4]Specifically, Chapter 13 provides in pertinent part:

> As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt --
>
> (1) provided for under section 1322(a)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title.

11 U.S.C.A. § 1328(a) (1978).

The two exceptions include debts pertaining to alimony and child support, 11 U.S.C.A. § 523(a)(5), and debts cured after default, 11 U.S.C.A. § 1322(b)(5).

criminal restitution, we conclude that such debts are dischargeable under Chapter 13.

The statutory provisions for the discharge of debts and exceptions thereto under Chapter 7 also supports the conclusion that restitution debts are dischargeable under Chapter 13. Unlike Chapter 13, Chapter 7 excepts ten categories of debt from discharge as set forth in section 523(a), including, as discussed, section 523(a)(7) which excepts from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit. . ." As the Court determined in Kelly, criminal restitution obligations fall within the category of "a fine, penalty, or forfeiture" under section 523(a)(7). Although Congress did incorporate into Chapter 13 one of the ten exceptions

under section 523(a), it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution, or any facsimile thereof. See supra note 3. Congress' considered decision to adopt only one of the section 523(a) exceptions to discharge for Chapter 13 and its concomitant failure to adopt the criminal penalties provision or any similar exception compels the conclusion that such penalties, including criminal restitution, are dischargeable under Chapter 13. Cf Kelly, 479 U.S. at 50.

We are mindful of the Court's admonition that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a

court considering equitable types of relief." Kelly, 479 U.S. at 49. However, where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of this court to cure any perceived "defects" in that legislation. That authority is granted to Congress alone. Excepting criminal restitution from discharge, accordingly, is a matter for the Congress, not for the courts. Here, Congress has codified the criminal penalties exception to discharge and has chosen not to apply the exception to Chapter 13 bankruptcy. Regardless of the potential effect on state criminal proceedings, therefore, we are constrained to conclude that the criminal restitution debt is dischargeable under Chapter 13.

We are equally mindful that Congress revised the Code in 1978 against a background of the judicial exception to the discharge of criminal penalties. If Congress had merely amended the Code in 1978 without either adopting or rejecting that exception, we would assume that Congress had acquiesced to its continued application. However, Congress did more than merely legislate against a background of an existing judicial exception; it codified the judicial exception and selectively incorporated it into the amended Code. Although Congress applied the codified exception to discharge under Chapter 7, it opted not to apply it to discharge under Chapter 13. Assuming that Congress desired to limit the application of that longstanding judicial exception, we are aware of no better method for Congress

to achieve that goal other than to codify the rule and to apply, or to omit to apply, that rule to the various chapters of the Code, as it has done. Where, as here, Congress has codified a judicial exception and only incorporated it into specific provisions of a statute, we believe it would be error for this court to inject that exception into the other provisions of the statute. We conclude, therefore, that Congress intended to vary the application of the criminal penalties exception under the Code, and did not intend to except such penalties from discharge under Chapter 13.

IV.

Accordingly, the judgment of the district court as to appellants Johnson-Allen and Steffler will be reversed and their cases remanded to the

district with directions to dismiss their appeals without prejudice because their claims were not ripe for resolution. The judgment of the district court with respect to the claims of the Davenports will be reversed and their case remanded to the district court with directions to affirm the order of the bankruptcy court.

Costs in the appeals of Johnson-Allen and Steffler will be taxed to each of them separately. With respect to the Davenports, costs will be taxed to the DPW, the appellee.

HUTCHINSON, Circuit Judge, dissenting.

The majority today holds that criminal restitution orders are "debts" within the meaning of §101(4) of the Bankruptcy Code and that they are dischargeable under Chapter 13 of the

Code. If the only basis for leaving criminal restitution orders undisturbed in bankruptcy were their non-dischargeability, I would agree with the majority that the textual differences between the Chapter 7 and 13 discharge sections would logically make these orders dischargeable in Chapter 13 proceedings. My disagreement with the majority lies in the threshold determination of whether such orders are debts. I am not persuaded by the majority's analysis on this point in the face of the strong dicta in Kelly v. Robinson, 107 S.Ct. 353 (1986), where the Supreme Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)" of the Code. Id. at 361. I believe that the concerns which prompted

the Supreme Court's reservations require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy. Accordingly, I respectfully dissent.[1]

In Kelly, the Supreme Court held that § 523(a)(7) of the Code preserves criminal restitution orders from discharge in Chapter 7 proceedings. Although it declined to decide whether such orders are debts under the Code, the Kelly Court voiced grave doubts as to whether they are debts before even

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[1]I agree with the Court that only the Davenports' appeal is ripe for disposition. See Majority Opinion, supra, at 423-424.

turning to the construction of § 523(a)(7). In doing so, it strongly suggested that the longstanding judicially created exception to bankruptcy court jurisdiction over criminal restitution orders was not altered by the Bankruptcy Code of 1978. This suggestion is strengthened by the Supreme Court's related observation that while "debt" is broadly drafted, "nothing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." Id. at 361 n.12.

The Kelly Court considered two factors in construing § 523(a)(7). They also underlie its comments on the debt issue. It first observed that the Code must be interpreted "in light of the history of bankruptcy court deference to

criminal judgments." Id. at 358. While the most natural construction of the predecessor statute, the Bankruptcy Act of 1898, would have allowed the discharge of criminal penalties, "most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court." Id. These courts reasoned that the bankruptcy laws affected only civil liabilities and not punishment for the violation of criminal laws, a rationale which was specifically applied to restitution orders imposed as part of criminal sentences. Id. at 359 & n.6. "Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity." Id. at 359.

The Supreme Court then noted that "interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." Id. at 360. If criminal restitution orders were dischargeable, judgments imposed by state criminal judges would be subject to remission. The prospect of this, the Kelly Court reasoned, would impinge on the ability of state court judges to fashion the most appropriate sentences for violations of state criminal laws. Id. Observing that Congress would not lightly limit the options available to state court criminal judges, id. at 360-61, the Kelly Court concluded that "the States' interest in administering their criminal justice systems free from

federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." Id. at 361.[2]

It was "[i]n light of the established state of the law -- that bankruptcy courts could not discharge criminal judgments" that the Supreme Court said, "we have serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." Id. at 361. Despite this statement and the longstanding policy against granting bankruptcy courts jurisdiction over criminal restitution orders, the majority finds that Congress must have

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[2]The inclusion of restitution orders in the term "debt" would also seem to affect sentencing in United States District Courts.

meant to include them within the definition of "debt." It finds persuasive the dissent in Kelly which reasoned that unless such orders are debts there would be no need to except them from discharge under § 523(a)(7). Majority Opinion, supra, at 427; Kelly, 107 S.Ct. at 365 (Marshall, J., dissenting).

Just as the majority concedes that most courts have concluded that criminal restitution orders are not "debts" under the Code, Majority Opinion, supra, at 424, I would, absent Kelly and the historical context to which the Supreme Court referred, have to concede logical force to the argument that if they are not debts, there is no need to deny them discharge under §523(a)(7). The Kelly Court, however, was surely aware of this argument. Its

grave doubts as to whether criminal penalties are debts in the face of the dissent's reasoning indicates to me that restitution orders imposed as part of criminal sentences are not debts, despite the language of § 523(a)(7).

The Supreme Court has not yet decided whether criminal restitution orders are included in the term "debt." However, it has distinguished them from other obligations, saying "'[u]nlike an obligation which arises out of a contractual, statutory or common law duty, [a criminal restitution order] is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.'" Id. at 362 (quoting In re

Pellegrino, 42 B.R. 129, 133 (Conn. 1984)).

The interpretation advocated by the debtors, and accepted by the majority, would intrude on the states' ability to choose the most efficacious means of furthering their penal interests. The interpretation is "in clear conflict with state . . . laws of great importance." United States v. Ron Pair Enterprises, Inc., ___U.S.___, ___, 109 S.Ct. 1026, 1033, ___ L.Ed.2d ___ (1989). We are not referred to any specific legislative history which demonstrates that Congress intended to include criminal restitution orders within the meaning of "debt."[3]

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[3]The majority concludes that the statutory term "debt" is plain and unambiguous. I believe the dicta in

(FOOTNOTE CONTINUED)

In the absence of such specific legislative history, I believe the dicta in Kelly apply. "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and

(FOOTNOTE CONTINUED)

Kelly imply otherwise. Accordingly, I believe this is "an appropriate case" to consider the absence of legislative history. See Ron Pair Enterprises, Inc., ___, U.S. at ___, 109 S.Ct. at 1032 (where the statutory language is open to interpretation and the proposed interpretation conflicts with important state laws, "a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code" (emphasis added)); cf. Id. at 4261-62 (O'Connor, J., dissenting) (even where language of the Code is not open to interpretation, a court will look to legislative history before concluding that established pre-Code practice has been changed; "[t]he rule . . . is that bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change.").

debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" Kelly, 107 S.Ct. at 361-62 (quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting)); see also id. at 359 ("if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific") (quoting Midlantic Nat'l. Bank v. New Jersey Dep't. of Environmental Protection, 474 U.S. 494, 501, 106 S.Ct. 755, 760 (1986)).[4]

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[4]The majority disposes of the impact its decision will have on the states' administration of their criminal justice systems by stating that "where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

this court to cure any perceived 'defects' in that legislation." Majority Opinion, supra, at 428 (emphasis added). I think it is beyond argument that today's decision will affect the sentencing discretion of state court judges. See Kelly, 106 S.Ct. at 360 (prospect of federal remission of judgments in some cases "would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems" (emphasis added)).

The difference between our approaches is also highlighted by the point at which these federalism concerns enter our respective analyses. The majority concludes that criminal restitution orders are debts and only addresses the impact on state criminal proceedings in discussing discharge-ability. In contrast, I would consider this impact both in determining whether criminal restitution orders are debts and whether they are dischargeable. The same is true of our respective treatment of the judicial exception to discharge of criminal penalties. Although this exception rests in part on the theory that orders imposed as part of a criminal sentence do not create a debtor-creditor relationship, see Kelly,

The judicially created exception "reflect[s] policy considerations of great longevity and importance." Ron Pair Enterprises, Inc., ___ U.S. ___, 109 S.Ct. at 1032. The majority opinion notes that the literal terms of the Code may support the discharge of criminal judgments, but that was also true under the Bankruptcy Act of 1898. The Supreme Court has indicated to me that the policy considerations and history transcend the logic

(FOOTNOTE CONTINUED)

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107 S.Ct. at 358-59 & n.6, the majority addresses it only after concluding that Congress intended to make such orders debts. By considering federalism concerns at each step, my approach is more likely to avoid construing the Code in a manner which impinges on the states' important interest in the unfettered administration of their criminal justice systems.

of a textual analysis. Accordingly, given this history, the complexity of the Code, the opinion of the Supreme Court in Kelly and the absence of legislative history evincing Congress's desire to alter pre-Code practice, I cannot conclude that Congress intended such a far reaching intrusion on the states' administration of their criminal justice systems as the majority's result entails.[5]

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[5]The majority finds support for its construction of "debt" in the fact that the discharge provisions of Chapter 13 are much broader than those of Chapter 7. It reasons that if criminal restitution orders are not debts, restitution payments may deplete a debtor's resources before distribution to other creditors. This, it is said, would make other creditors less likely to confirm a Chapter 13 plan and would therefore be "contrary to Congress' objective of expanding the availability of the Chapter 13 option." Majority Opinion, supra, at 427.

(FOOTNOTE CONTINUED)

I would affirm the order of the district court holding that the Davenports' criminal restitution obligation was not affected by the discharge.

(FOOTNOTE CONTINUED)

Only debts are subject to discharge. The fact that Chapter 13 contains a very broad discharge for obligations which are debts does not necessarily mean that criminal restitution orders should be considered debts. The question is not whether Congress intended to broaden the availability of the Chapter 13 remedy, but how great it intended this expansion to be. I believe the Supreme Court teaches us that if Congress had intended to remove the power to finally define the extent to which a person convicted of crime should make restitution from the criminal courts and place it in the bankruptcy courts -- by relegating his criminal restitution orders to the same status as his other obligations -- it would have spoken more clearly.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD & DEBORA DAVENPORT	:	CIVIL ACTION
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, COURT OF COMMON PLEAS OF BUCKS COUNTY AND EDWARD SPARKMAN, TURSTEE	:	Bankruptcy No. 87-2395F Adversary No. 87-0737F No. 88-3177

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JULY 29, 1988

Before the court is an appeal from a Bankruptcy Court Order discharging certain criminal restitution payments due from appellees Edward and Debora Davenport by Order of the Court of Common Pleas of Bucks County, Pennsylvania.

On September 17, 1986, the Davenports both entered pleas of guilty to welfare fraud in the Court of Common

Pleas of Bucks County. They were each sentenced to one year probation and ordered to pay $208.00 per month in restitution to the Bucks County Adult Probation and Parole Department ("Probation Department") until a total of $4,144,80 was repaid. Upon receipt of restitution payments, the Probation Department was to forward the payments to the victim of the crime, Pennsylvania Department of Public Welfare ("DPW"), who would share repayments with the federal government in accordance with 62 P.S. § 474. However, the Davenports never made any restitution payments.

On May 13, 1987, the Davenports filed a joint petition under Chapter 13 of the Bankruptcy Code. They listed the restitution obligation as an unsecured amount owed to the DPW.

On July 2, 1987, the Probation Department notified the Davenports that a pre-violation hearing would be held August 6, 1987. On July 20, 1987, counsel for the Davenports informed the Probation Department of the bankruptcy filing and requested that the parole violation charges be withdrawn. The Probation Department refused and held a pre-violation hearing on August 6, 1987, at which Mrs. Davenport appeared with counsel.

On August 12, 1987, the Davenports filed an adversary complaint in Bankruptcy Court to determine if their criminal restitution obligations were dischargeable. On October 20, 1987, the Bankruptcy Court confirmed the Davenports' Chapter 13 plan; the plan provided for payment of the restitution

obligations imposed by the Bucks County Court of Common Pleas. On October 26, 1987, the Bankruptcy Court held a hearing on the adversary complaint. On October 29, 1987, the Bucks County Court of Common Pleas held a violation of probation hearing. The violation charge was dismissed, but the Davenports were ordered to pay full restitution within three years. In an opinion dated March 8, 1988, the Bankruptcy Court determined that the restitution payments ordered by a state court as part of a criminal sentence were dischargeable in a Chapter 13 proceeding and that all restitution obligations imposed by the Bucks County Court of Common Pleas would be discharged by compliance with the Chapter 13 plan approved by the Bankruptcy Court. This appeal followed.

In accordance with the United States Supreme Court's opinion in Kelly v. Robinson, 479 U.S. ____, 107 S. Ct. _____, 93 L.Ed.2d 216 (1986), L.Ed.2d 216 (1986), and as stated in the well-reasoned opinion of Judge Gawthrop in Commonwealth v. Johnson-Allen. No. 87-1032, slip op. (E.D. Pa. July 14, 1988), the court holds that the Bankruptcy Code does not authorize discharge of state-imposed criminal restitution in a Chapter 13 bankruptcy.

Allowing a federal bankruptcy court to discharge a financial obligation imposed by a state court as an alternative punishment for crime would conflict with important policies of federalism. See Younger v. Harris, 401 U.S. 37 (1971). The decision to impose a particular punishment involves

a weighing of various goals of the state criminal justice system. See Kelly, 93 L.Ed.2d at 228. Sometimes the particular punishment (e.g. restitution payments to the victim of the crime) will have a concomitant private benefit for the victim of crime. Despite this private benefit, criminal restitution benefits, unlike civil obligations, involve vindication of fundamental public interests. See Id. at 227 ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.").

Although criminal restitution payments made to the court as ordered may be forwarded to the DPW or other victim of crime, the amount of payments is ordered by the court and is discretionary with the court in light of the circumstances. In Pennsylvania, no

victim has the right to recover restitution directly through the criminal process, whatever the entitlement to civil recovery. If criminal restitution payments eventually inure to the victim, the restitution is an incidental private benefit received in the implementation of public goals of punishment, deterrence and rehabilitation.

If a criminal restitution obligation can be discharged by filing a Chapter 13 petition, courts would be reluctant to impose restitution as a criminal penalty and might opt for periods of incarceration instead. It is essential that state courts are able to impose penal sanctions other than incarceration without fear that a federal court will render this punishment nugatory after the fact. Congress

did not state any express intention to the contrary. Whatever the rationale and merit of the views of the Bankruptcy Court as cogently analyzed by Judge Fox, we do not write on a clean slate. In view of the direction given by the Supreme Court in Kelly v. Robinson, 479 U.S. _____, 107 S. Ct. _____, 93 L.Ed.2d 216 (1986), until Congress acts or reacts, this court must reverse.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD & DEBORA DAVENPORT	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, COURT OF COMMON PLEAS OF BUCKS COUNTY and EDWARD SPARKMAN, TRUSTEE	:	Bankruptcy No. 87-2395F Adversary No. 87-0737F No. 88-3177

ORDER

AND NOW, this 29th day of July, 1988, it is ORDERED that the Opinion of the Bankruptcy Court, dated March 8, 1988, is REVERSED for the reasons set forth in the foregoing Memorandum.

_____ J.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
EDWARD J. DAVENPORT, SR. a/k/a EDWARD DAVENPORT and DEBORA A. DAVENPORT	:	
Debtors	:	Bankruptcy No. 87-02395F
EDWARD & DEBORA DAVENPORT	:	
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and COURT OF COMMON PLEAS OF BUCKS COUNTY, ADULT PROBATION AND PAROLE DEPT. and EDWARD SPARKMAN, TRUSTEE	:	
Defendants	:	Adversary No. 87-0737F

O P I N I O N

By BRUCE FOX, Bankruptcy Judge:

The narrow issue before me is whether a criminal restitution obligation may be discharged in a Chapter

13 case. The debtors have commenced an adversary proceeding seeking a determination that an order of criminal restitution requiring them to make payments to the Bucks County Adult Probation and Parole Department represents a dischargeable unsecured debt which is provided for by their confirmed chapter 13 plan and which is made dischargeable by virtue of 11 U.S.C. §1328. Both the Probation and Parole Department as well as the Commonwealth of Pennsylvania, Department of Public Welfare, (DPW) to whom the restitution payments would ultimately be sent, vigorously oppose the dischargeability of this obligation.

I.

The underlying facts are not seriously controverted.

On September 17, 1986, both debtors entered guilty pleas to the crime of welfare fraud in state court in Bucks County, Pennsylvania. Each was sentenced to one year probation; each was ordered to make criminal restitution payments of $208.00 per month beginning in December, 1986, until a total of $2,072.40 was repaid by the debtors. Payments were to be completed by September, 1987, and were to be sent to the Probation and Parole Department which was then to forward them to DPW.

On May 15, 1987, the debtors filed a voluntary petition in bankruptcy under chapter 13. The criminal restitution obligation was listed as an unsecured debt payable to DPW which was

to be paid as other unsecured debts are paid. When the debtors failed to make restitution payments as required by state court order, the Probation and Parole Department commenced violation hearings on July 2, 1987. An informal hearing was scheduled before the Department on August 6, 1987. On July 20, 1987, debtors, through their bankruptcy counsel, informed the Department of the pendency of their bankruptcy case and requested that the Department consider withdrawing the parole violation charges. When the Department decided to press the violation issue, this adversary proceeding was initiated on August 12, 1987. On October 20, 1987, the debtors' chapter 13 plan was confirmed without objection from any creditors and with

the express approval of the standing chapter 13 trustee. See In re Hines, 723 F.2d 333 (3d Cir. 1983).

This proceeding was heard by this court prior to a hearing scheduled in state court for October 29, 1987, on the question of probation violation. While the Department was willing to request that the violation hearing be postponed, pending the outcome of this hearing, ultimately the debtors decided to proceed in state court. The parties informed me that state court insisted and the debtors agreed to make restitution payments;[1] however, the debtors

[1]A new order was entered granting the debtors three years to make restitution payments.

are also continuing to press their dischargeability complaint.[2] See In re Johnson-Allen, 69 B.R. 461, 463 (Bankr. E.D. Pa. 1987) appeal pending (debtor resumed making restitution payments pending disposition of dischargeability complaint).

II.

The fact that the debtors' chapter 13 plan has already been confirmed provides a framework for the

[2]The debtors sought to introduce evidence that they never agreed to make restitution in September 1986. The defendants sought to introduce evidence that the debtors could afford restitution payments. The former is more properly addressed to state court. The latter is barred by the entry of the confirmation order. If the defendants believe that all of the debtors disposable income was not to be paid under their plan, this should have been raised prior to confirmation. Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1226 (8th Cir. 1987); In re Fries, 68 B.R. 674 (Bankr. E.D. Pa. 1986).

dispute before me. 11 U.S.C. §1327(a) states that:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

Thus, the debtor's plan, which provides for the payment of their criminal restitution obligation, is now binding upon their creditors. See Matter of Gregory, 705 F.2d 1118 (9th Cir. 1983) (embezzlement debt). See also In re Bonanno, 78 B.R. 52 (Bankr. E.D. Pa. 1987); In re Stern, 70 B.R. 472 (Bankr. E.D. Pa. 1987). However, although the plan terms may be binding, 11 U.S.C. §1328(a) limits the chapter 13 discharge to, inter alia, "all debts provided for by the plan." Clearly, the criminal restitution obligation is "provided for"

by the debtors' plan. Matter of Gregory. The issue therefore becomes whether the criminal restitution order is a "debt" - a matter expressly left open by the Supreme Court in Kelly v. Robinson, ____U.S. ____, 107 S.Ct. 353 (1986). If so, upon completion of their plan payments, the debtors' obligation to make restitution must be discharged. See In re Cullens, 77 B.R. 825 (Bankr. D. Colo. 1987); In re Stern. If the obligation is not a "debt" within the meaning of the Bankruptcy Code, see e.g. In re Oslager, 46 B.R. 58 (Bankr. M.D. Pa. 1985), then the obligation is not discharged.[3]

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[3]This analysis differs from that adopted in In re Newton, 15 B.R. 708 (Bankr. N.D. Ga. 1981). The Newton court considered that the criminal restitution obligation was a debt, but it was nondischargeable nonetheless. Newton held that policy considerations required it to interpret §1328(a) beyond its stated exceptions.

With statutory interpretation one starts first with the language of the relevant statutory provisions. Kelly v Robinson, 107 S.Ct. at 358. A "debt" is defined as a "liability on a claim." 11 U.S.C. §101(11). A claim is defined as follows:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. §101(4).

This definition is much broader than existed under the former Bankruptcy Act of 1898. See Ohio v. Kovacs, 469

U.S. 274, 105 S.Ct. 905 (1985); In re Heincy, 78 B.R. 246 (Bankr. 9th Cir. 1987); In re Johnson-Allen, 69 B.R. 461, 467 (Bankr. E.D. Pa. 1987). In this circuit, the Court of Appeals has interpreted this definition with an eye toward its legislative history:

> Congress intended the definition of a claim to be very broad; the legislative history states:
>
> The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.... By this broadest possible definition, and by the use of the terms throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no

> matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

Matter of M. Frenville Co., Inc., 744 F.2d 332, 336 (3d Cir. 1984) cert. denied, 449 U.S. 1160 (1985) quoting H.R. Rep. No. 95-595, 95th Cong. 2d Sess. 309 (1978). Accord e.g., Ohio v. Kovacs; Remington Rand Corp. v. General Services Administration, 836 F.2d 825 (3d Cir. 1988). The existence of a claim, for bankruptcy purposes, arises when: (1) the claimant possesses a right to payment; and (2) the right to payment arose prepetition.[4] Remington Rand 836 F.2d at 830.

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[4]There is no dispute that both the debtor's conduct which gave rise to their prosecution and the restitution order occurred prepetition.

The criminal restitution obligation is derived from an order of the Bucks County Court of Common Pleas, entered pursuant to 18 P.S. §1106. This criminal statute defines restitution as "the return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court." The amount of restitution and manner of payment is left, within limits, to court discretion. If restitution is ordered, payment shall be made to the probation department which shall then forward the payments to the victim. While the victim is not divested of any right to seek a civil damage award, that award must be reduced by the restitution payments received. Finally, enforcement of the restitution order is by contempt proceeding. Id. See Commonwealth v. Wood, 300 Pa.Super. 463, 446 A.2d 948 (1982).

I agree with those courts that have concluded that restitution obligations fall within the broad definition of a "claim", recently enacted by Congress with the passage of the Bankruptcy Code. E.g In re Heincy; In re Hackney, 16 BCD 1357 (Bankr. N.D. Cal. 1988); In re Cullen, 77 B.R. 825 (Bankr. D. Colo. 1987); In re Taite, 76 B.R. 764 (Bankr. C.D. Cal. 1987); In re Johnson-Allen; In re Gilliam, 67 B.R. 83 (Bankr. M.D. Tenn. 1986); In re Brown, 39 B.R. 820 (Bankr. M.D. Tenn. 1984); In re Newton. Contra e.g., In re Oslager; In re Pellegrino, 42 B.R. 129 (Bankr. D. Conn. 1984); In re Button, 8 B.R. 692 (Bankr. W.D.N.Y. 1981). Both the Probation and Parole Department as well as DPW had the prepetition right to demand payment from the debtors. That the Department's right was enforceable

by contempt rather than by civil execution, or that it arose as a result of a criminal order rather than by a civil judgment does not make it any less of a right to payment:

> If the Bankruptcy Code said that only orders to pay money by civil courts are debts for bankruptcy purposes, then credence could be given to the defendant's argument that a criminal court restitution order does not embody a "debt" dischargeable in bankruptcy. However, nothing in the Bankruptcy Code suggests that only civil courts enter orders to pay money that are subject to discharge in bankruptcy. A restitution order by a criminal court no less acknowledges the existence of a debt than an order of a civil court reducing that claim to judgment. The fact that a criminal court might participate in enforcement or collection of the debt between victim and debtor/defendant does not make the underlying obligation a "nondebt" for bankruptcy purposes.

In re Brown, 39 B.R. at 822. Accord e.g. In re Johnson-Allen. See also 5 Collier on Bankruptcy ¶1300.12[2] (15th Cir. 1987).

Indeed, this point is emphasized by the existence of 11 U.S.C. §523(a)(7). Since only "debts" are discharged in bankruptcy, fines, penalties and forfeitures made payable to governmental units must be debts; otherwise there would be no need to expressly make such obligations nondischargeable in chapter 7 and some chapter 11 cases. In re Cullens; In re Johnson-Allen. In likening criminal restitution obligations to fines and penalties, the Supreme Court in Kelly v. Robinson made it difficult to conclude that a governmental unit possesses no

right to payment. Thus, both the Department and DPW had a right to payment which arose prepetition. Both entities possessed a "claim" and held a "debt" within the meaning of the Bankruptcy Code. See Remington Rand.[5]

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[5]Although the Probation and Parole Department was not listed as a creditor, it had knowledge, as a defendant, of the debtors' bankruptcy filing and their intentions regarding their criminal restitution obligation. Without now deciding this issue, it is possible that service of this adversary proceeding constituted sufficient notice to bind the Department to the confirmed plan. See Reliable Electric Co. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984). See also 11 U.S.C. §523(a)(3). Here, the adversary complaint was served more than two months prior to confirmation. Of course, it is better practice to have scheduled the Department as a creditor. In re Johnson-Allen, 69 B.R. at 465.

III.

Although I conclude that restitution obligations are claims as defined by 11 U.S.C. §101(4), that conclusion does not completely end the analysis in this proceeding. In Kelly v. Robinson, 107 S.Ct. at 361, the Supreme Court stated:

> In light of the established state of the law - that bankruptcy courts would not discharge criminal judgments - we have serious doubts whether congress intended to make criminal penalties "debts" within the meaning of §101(4).

(footnote omitted).

These doubts arose because the Court, in reviewing decisions under the former Bankruptcy Act of 1898, concluded that criminal restitution obligations were not dischargeable. It is a rule of statutory construction that clear evidence should be found before a court

concludes that Congress intended to alter long-standing statutory interpretations. Midlantic National Bank of New Jersey Department of Environmental Protection, 474 U.S. 494, 106 S.Ct. 755, 760 (1986). Accord e.g. In re Paolino, 75 B.R. 641, 649 (Bankr. E.D. Pa. 1987). Thus, the focus becomes one of Congressional intent regarding the scope of the chapter 13 bankruptcy discharge. When considering this question of intent, a bankruptcy court must also be mindful, not just of the prior policy concerning criminal restitution, but also, of federalism and comity concerns regarding federal court interference with state court criminal prosecutions, expressed in decisions such as Younger v. Harris, 401 U.S. 37 (1971).

A.

When Congress accepted the recommendation of the Bankruptcy Commission to revise former chapter XIII, it did so recognizing that chapter XIII had not been much utilized at least in some parts of the country. The Report of the Committee on the Judiciary, House of Representatives stated:

> In addition, an overly stringent and formalized chapter XIII (wage earner plans) has discouraged overextended debtors from attempting to arrange a repayment plan under which all creditors are repaid most, if not all, of their claims over an extended period. The hearings before the Sub-committee indicated strongly that most consumer debtors would rather work out a repayment plan than file straight bankruptcy. They opt

> for straight bankruptcy only because present chapter XIII simply cannot meet their needs. Only in certain areas of the country where the bankruptcy judges have taken an active interest, have put in the extra effort required to make chapter XIII work, and have encouraged the bar to recommend its use, has chapter XIII provided any substantial or realistic alternative to straight bankruptcy liquidation.

H.R.Rep. No. 95-595, 95th Cong. 1st Sess. at 117 (1977)(footnotes omitted). Congress, after reviewing the commission report and conducting hearings, determined that an attractive, flexible chapter 13 would benefit both creditors and debtors. Debtors would be able to avoid the effects (such as loss of nonexempt property) and stigma of liquidation while general unsecured creditors would be able to recover some repayment on outstanding debts:

The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

Id. at 118.

Various changes were engrafted into the new chapter 13 that make it an attractive alternative to chapter 7. For example, eligibility to become a debtor under chapter 13 was expanded: no

longer were only wage earners qualified to formulate reorganization plans. Reorganization procedures were made inexpensive. There was no cumbersome writing or disclosure requirements. As the House Report noted:

> This bill attempts to cure these inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting consumer debtors that have occurred both in the bankruptcy court and out. First, the bill simplifies, expands, and makes more flexible wage earner plans, called plans for Individuals with Regular Income, under the bill. Second, many of the provisions in the current bankruptcy law that enable private action to undo the beneficial effects of bankruptcy are changed. Third, the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start. Fourth, the bankruptcy system is modified to eliminate the close relationship between a bankruptcy judge and a trustee that often works to the consumer debtor's detriment. The premises of the bill with respect to consumer bankruptcy

> are that use of the bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under chapter 13, Adjustment of debts of an Individual and Regular Income; and finally, whether the debtor uses chapter 7 liquidation, or chapter 13, Adjustment of Debts of an Individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start.

Id. at 117-118. See also In re Bobroff, 766 F.2d 797, 803-804 (3d Cir. 1985); 5 Collier on Bankruptcy ¶1300.02 (15th ed. 1987); 3 Norton Bankruptcy Law and Practice, ¶66.07 (1981).

Another method chosen by Congress to make Chapter 13 reorganization plans attractive to individual creditors was to provide them with a broad discharge upon completion of their plan payments - broader than the discharge received in chapter 7. As the Commission Report made clear:

> If the debtor wants to pay his debts pursuant to a plan, and if the creditors are willing to go along, he should be allowed to do so. The fact that a discharge would not be available in a liquidation case should furnish a greater incentive for the debtor to perform under the plan.

Report of the Commission on The Bankruptcy Laws of the United States, H. Doc. No. 93-137. 93d Cong. 1st Sess. Pt.I at 175 (1973). Therefore, 11 U.S.C. §1328(a) makes dischargeable debts that would not be dischargeable in chapter 7, such as debts involving fraud and embezzlement. See Matter of Gregory; In re Gilliam; 3 Norton Bankruptcy Law and Practice ¶78.01 (1979)[6] Even fines, penalties and forfeitures, made payable to governmental units, are made dischargeable in chapter 13.

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[6]Compare §1328(b), the hardship discharge, which is not broader than the chapter 7 discharge.

In determining whether Congress intended to make criminal restitution payments nondischargeable, I agree with the Ninth Circuit Bankruptcy Appellate Panel, that the examination of congressional intent is best achieved by considering the discharge provisions of chapter 13, rather than the definition of "claim" or "debt":

> If Congress desired, for policy reasons, to preclude a state criminal defendant in bankruptcy from nonpayment of an order of restitution, it is unlikely that it would do so by limiting the definition of "claim" and "debt". A more effective means to this end would be achieved by altering the dischargeability provisions under the Code.

In re Heincy, 78 B.R. at 248. See also In re Brown, 39 B.R. at 829. As discussed above, I am persuaded that Congress understood that the broad discharge of chapter 13 would make dischargeable debts which were historically nondischargeable under the

provisions of the Bankruptcy Act. This includes fines and penalties, as well as restitution obligations.

Recent amendments to the Bankruptcy Code have sought to insure that the purposes Congress envisioned when it modified chapter 13 from its precode form are achieved. Insofar as this dispute is concerned, the most significant amendment is 11 U.S.C. §1325(b):

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due

under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended -

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

By virtue of §1325(b), unsecured creditors can compel that all of the debtor's disposable income (as defined) will be distributed under a confirmed chapter 13 plan. See Education Assistance Corp. v. Zellner; In re Fries.

Were prepetition criminal restitution obligations not dischargeable, conflicts would exist between the debtor's obligation to utilize all of his

disposable income in plan payments and his obligation to make restitution. Under state law, 18 U.S.C. §1106, a court must consider the debtor's financial circumstances, as well as the injury suffered by the victim, when establishing the terms of restitution. The funds from which restitution is ordered would be considered disposable income under §1325(b). If restitution is not a debt governed by a chapter 13 plan, then either the debtor cannot comply with §1325(b), or the definition of disposable income must be adjusted. The former result would defeat the congressional goal of encouraging the use of chapter 13; the latter result would defeat the equality of treatment principle focused in 11 U.S.C. §1322(a)(3), for the prepetition victim would receive greater payments than other unsecured creditors.

As Judge Scholl noted in In re Johnson-Allen, Congress determined that the policies to be furthered both by the broad "fresh start" created by the chapter 13 discharge, along with equality of treatment to creditors who shall receive the debtor's disposable income were sufficient reasons to alter precode precedent. This determination is clear from the history surrounding the enactment and amendments to chapter 13.

B.

Most courts which have expressed difficulty with the notion that a criminal restitution order might be dischargeable, do so in terms quite similar to the following legislative statement which is part of the legislative history of 11 U.S.C. §362(b):

> The bankruptcy laws are not a haven for criminal offenders but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 342 (1977). See In re Newton, 15 B.R. at 710. Discharging a restitution obligation does not run counter to this legislative statement. 11 U.S.C. §362(b)(1) excepts from the operation of the automatic stay "the commencement or continuation of criminal actions against the debtor." The policy of not making the bankruptcy court a "haven" for criminals is preserved by insuring that those accused of a crime may be prosecuted even though they may file bankruptcy petitions. Moreover, federalism, and comity are respectd by

decisions such as Matter of Davis, 691 F.2d 176 (3rd Cir. 1982) which forbids a bankruptcy court from enjoining the criminal prosecution even though the debtor fears that restitution will be imposed. Unless the prosecution is brought in bad faith, no injunction may issue. Id. Accord Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982).

In forbidding the issuance of an injunction, the Third Circuit noted that the sentencing discretion provided to criminal courts might possibly be affected by provisions of the bankruptcy code. Matter of Davis, 691 F.2d at 178, 179, n.8. The Supreme Court feared that discharging restitution obligations would have such an undesirable result.

> This prospect [discharge] in turn, would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines,

> and restitution most likely to further the rehabilitative and deterent goals of state criminal practice systems.

Kelly v. Robinson, 107 S.Ct., at 360 (footnote omitted).

But as the Supreme Court noted, fines and penalties along with restitution are also among the sentencing options accorded to state criminal judges. Yet, there is no dispute that §1328(a) discharges criminal fines and penalties.[7] There is no expression in

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[7]This case does not present the complex question whether payment of a restitution obligation under a chapter 13 plan is grounds to revoke probation. See United States v. Caddell, 830 F. 2d 1008 (5th Cir. 1987) (chapter 11 debtor is not insulated from probation revocation hearing when he fails to comply with.restitution order); In re Gilliam (only the discharge injunction provided by §524 protects a chapter 13 debtor from a revocation hearing; (the bankruptcy court does not discuss §1327).

either the current statutory language or legislative history that Congress was more protective of restitution obligations than of criminal fines or penalties. Thus, I cannot conclude that comity or federalism concerns mandate that restitution obligations be nondischargeable.

IV.

To the extent that the chapter 13 discharge is too broad, this results from choices made by Congress. If this is a problem which needs to be addressed it is up to Congress, not this court to do so. See generally Tennessee Valley Authority v. Hill, 437 U.S. 153, 185, 98 S.Ct. 2279, 2297 (1978); Gennuso v. Commercial Bank and Trust Co., 566 F.2d 437, 443 (3d Cir. 1977)(misgivings about the scope of the consumer protection statute should be addressed to Congress not to the court). Indeed, Senate Bill, No. 548, 100th Cong. 1st Sess. would make, some, but not all,[8] restitution

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[8]The bill seems to make non-dischargeable only restitution obligations concerning violation of consumer protection statutes. See In re Cullens, 77 B.R. at 828; S.Rep. No. 246, 100th Cong., 1st Sess. at 8-9 (1987).

obligations nondischargeable in chapter 13. See S.Rep. No. 246, 100th Cong. 1st Sess., at 8-9 (1987). The bill was passed by the Senate on July 24, 1987 and is pending before the House. Until 11 U.S.C. §101(4) or, more likely, §1328(a) is amended, I have no choice but to apply their terms. Therefore, the debtors' criminal restitutional obligation is dischargeable upon completion of their plan payments. As any payments of the restitution obligation already made would constitute property of the estate, 11 U.S.C. §1306, any funds paid by the debtors to defendants shall be turned over to the standing chapter 13 trustee. In re Johnson-Allen.

An appropriate order will be entered.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
EDWARD J. DAVENPORT, SR. a/k/a EDWARD DAVENPORT and DEBORA A. DAVENPORT	:	
Debtors	:	Bankruptcy No. 87-02395F
EDWARD & DEBORA DAVENPORT	:	
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE and COURT OF COMMON PLEAS OF BUCKS COUNTY, ADULT PROBATION AND PAROLE DEPT. and EDWARD SPARKMAN, TRUSTEE	:	
Defendants	:	Adversary No. 87- 0737F

O R D E R

AND NOW, this 8th day of March, 1988, upon consideration, it is hereby ORDERED that the obligation of the

debtors to make payments to the Bucks County Adult Probation and Parole Department for the purposes of restitution to the Commonwealth of Pennsylvania Department of Public Welfare represents a dischargeable, unsecured debt in this chapter 13 case. Any payments made by plaintiffs and received by defendants shall be turned over to the standing chapter 13 trustee.

/s/
BRUCE FOX
United States Bankruptcy Judge

EDWARD DAVENPORT
DEBORA DAVENPORT

Chapter 13
Bankruptcy No.
87-02395F
Adversary No.
87-0737F

Copies of the Bankruptcy Judge's Opinion and Order dated March 8, 1988, mailed on said date to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENTA OF PUBLIC WELFARE	:	FILED JULY 15, 1988
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

MEMORANDUM AND ORDER

GAWTHROP, J.

Pending before this court is an appeal from the Department of Public Welfare (DPW) from a bankruptcy court decision, involving two similar cases, which held that criminal restitution payments may be discharged in a Chapter

ENTERED: 7/15/88

CLERK OF COURT

13[1] case. Upon consideration of the statute, and its interpretation by the Supreme Court in Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), in which the Court construed it against the background of certain long-standing policies, I will reverse.

BACKGROUND

On January 17, 1984, and June 18, 1985, respectively, appellees, Ruby Steffler and Lorraine Johnson-Allen pled guilty to welfare fraud. Appellees were placed on probation and were ordered to

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[1] 11 U.S.C. §§ 1301-1330. This Chapter permits debtors to retain their assets, while applying a portion of future earnings towards their debts. See generally: In re Smith, 848 F.2d 813 (7th Cir. 1988); 3 W. Norton, Bankruptcy Law and Practice §§ 66.08 - 66.09 (1981).

make restitution payments to the DPW[2] pursuant to section 62 Pa.Stat.Ann. § 481 (Supp. 1988).

After they had begun making restitution payments, appellees filed voluntary petitions for relief under Chapter 13. On May 19, 1986, DPW filed separate complaints in the bankruptcy court against the appellees to determine

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[2]Before this case was reassigned to me, Judge Ditter issued an order requiring DPW to show cause why it had standing to challenge the dischargeability of the restitution payments, the record not being complete in this regard. In the accompanying memorandum, Judge Ditter noted that "in the cases cited by the parties, the challenge to the discharge of the restitution payments was brought by the state agency that received the payments directly from the offender. Commonwealth of Pennsylvania v. Johnson-Allen, 81 B.R. 295, 296 (E.D. Pa. 1987). Since appellees made their restitution payments directly to DPW, it is now clear that DPW has standing in this matter.

the dischargeability of their debt. These complaints alleged, essentially, that the restitution payments were not "debts" within the meaning of the Bankruptcy Code (Code), and, hence, non-dischargeable. Appellee filed answers and counterclaims against the agency, contesting the legal bases for DPW's assertions, and averring that the agency was in contempt of court for violating the automatic stay provisions of the Code. 11 U.S.C. §362. Cross-motions for summary judgment were then filed by the parties. The Honorable David A Scholl, United States Bankruptcy Judge, granted appellees' motions for summary judgment, but declined, however, to grant sanctions against DPW pursuant to 11 U.S.C. § 362(h). In re Johnson-Allen, 69 B.R. 461 (Bkrtcy. E.D. Pa. 1987).

DISCUSSION

The Code defines a "debt" as a "liability on a claim." 11 U.S.C. § 101(11). The term "claim" is defined by 11 U.S.C. § 101(4), which reads as follows:

> (4) "claim" means-
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

In interpreting these provisions and assessing the policies underlying them, I begin by considering

the effect of the Supreme Court's decision in Kelly v. Robinson, supra. There, one Carolyn Robinson had been convicted of larceny for wrongfully receiving public assistance benefits. A Connecticut state court sentenced her to a term of probation, conditioned on her making restitution payments to the State of Connecticut Office of Adult Probation (COAP). Three months later, Robinson filed a petition under Chapter 7 of the Code, 11 U.S.C. § 701-766, in which she listed COAP as a having a claim against her. COAP filed neither a complaint to determine dischargeability, nor an objection to discharge, and, consequently, on May 14, 1981, the Bankruptcy Court granted Robinson's petition. In February of 1984, COAP informed Robinson that it intended to enforce the restitution order. Robinson responded by instituting adversarial proceedings in

the bankruptcy court. Following a trial, the bankruptcy judge concluded that Robinson's obligation to pay restitution was unaffected by its order of May 14, 1981.

The Second Circuit reversed, holding that the restitution obligation constituted a "debt," dischargeable under the Code, and pointing to legislative history of the Code which they read to suggest that "in enacting § 101(4), Congress sought the 'broadest possible definition' of a claim, ...intending that virtually all obligations to pay money be amenable to treatment in bankruptcy proceedings..." In re Robinson, 776 F.2d 30, 35 (1985)(citation omitted), rev'd, sub nom., Kelly v. Robinson, supra. The Court of Appeals reasoned that "by giving 'claim' the broadest possible definition and defining 'debt' in terms

of a 'claim,' Congress also sought to give the term 'debt' its broadest possible scope." 776 F.2d at 36. It is this analysis that Judge Scholl approved in his very thorough opinion which is before me for review.[3]

It is this analysis, however, that the Supreme Court disapproved. Speaking through Justice Powell, the Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of

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[3]In support of this viewpoint, Judge Scholl cites Ohio v. Kovacs, 469 U.S. 274, 278-80 (1985). That case, however, is factually and legally distinguishable from the case at bar. In Kovacs, the Supreme Court was faced with the issue of whether obligations under a civil court order, i.e. an injunction to clean up a hazardous waste site, fell within the Code's definition of a "debt." By contrast, the sole issue here is whether criminal restitution payments fall within the Code's purview.

§ 101(4)." 107 S.Ct. at 361., 93 L.Ed.2d at 229 (footnote omitted). The Court observed that Congress had enacted the Code in light of established judicial precedent, holding that bankruptcy provisions "have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." 107 S.Ct. 359, 93 L.Ed.2d at 226, quoting In re Moore, 111 F. 145, 150 (WD Ky. 1901). The Court found nothing in the language of the Code, nor in its legislative history, which showed that Congress intended to abrogate this judicial exception with respect to criminal judgments. 107 S.Ct. 359, 361, n.12, 93 L.Ed.2d at 229. In so stating, the Court underscored its

> deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." Younger v. Harris. 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1971).

107 S. Ct. 358-360, 93 L.Ed.2d at 227.[4]

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[4]This sensitivity to the separate sovereign status of the Nation and its sundry States is well recognized in this circuit. In Matter of Davis, 691 F.2d 176, 179 (3d Cir. 1982), Judge Adams pertinently stated:

> [A] federal court must consider "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire Country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

(FOOTNOTE CONTINUED ON NEXT PAGE)

The Court further noted that, "apart from the burden on state officials of following and participating in bankruptcy proceedings, it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federal bankruptcy courts." 107 S.Ct. at 360, n.8, 93 L.Ed.2d at 227-228, n. 8.

The Court refrained from deciding whether restitution payments constituted "debts" under the Code, holding, instead, that the restitution order was nondischargeable under Chapter

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(FOOTNOTE CONTINUED)

> States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. ... [37,] 44 [(1971)]. A federal court should be especially cautious in enjoining state criminal proceedings, because of the state's paramount interest in protecting its citizens through its police powers.

7, because it fell within the exception to discharge found in 11 U.S.C. § 523(a)(7). 107 S.Ct. 361-363, 93 L.Ed.2d 229-231. This section provides, in pertinent part:

> (a) A discharge under section 727...of this title does not discharge an individual debtor from any debt--
>
> * * * *
>
> (7) to the extent such debt is for fine, penalty, or forfeiture payable to and for the benefit of a governmental unit and is not compensation for actual pecuniary loss, other than a tax penalty;
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition....[5]

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[5]Judge Scholl viewed this ultimate subsection as providing support for an absence of Congressional intent to exclude all criminal penalties, stating:

(FOOTNOTE CONTINUED ON NEXT PAGE)

The foregoing exception to discharge does not apply to proceedings under Chapter 13. The applicable discharge provision for this chapter is 11 U.S.C. § 1328, which pertinently states:

> (a) As soon as practicable after completion by the debtor of all payments under the Plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--
>
> (1) provided for under section 1322(b)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title.

Although, as the dissent noted in Kelly v. Robinson,[6] the holding of the Supreme Court left open the question of whether criminal restitution payments are debts dischargeable in Chapter 13 proceedings, its rationale is no less compelling merely because it chose to address the matter in the context of Chapter 7.

The Supreme Court's reasoning is particularly persuasive in light of

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(FOOTNOTE CONTINUED)

"It is difficult to understand what purpose Congress would have served by exempting criminal penalties less than three (3) years old from discharge if it meant to exempt all such penalties from discharge." In re Johnson-Allen, 69 B.R. at 467. I must disagree with Judge Scholl's construction of this subsection, since it applies only in regard to tax penalties. In re Kohr, 82 B.R. 706, 710 (Bkrtcy. M.D. Pa. 1988); 1 W. Norton, Bankruptcy Law and Practice § 27.33 (1981).

[6] 107 S.Ct. at 366, n.6, 93 L.Ed.2d at 234, n.6 (Marshall, J. dissenting).

the pronouncement by the Pennsylvania Superior Court, affirmed sub silentio by the Pennsylvania Supreme Court, that "[a]n order of restitution does not establish a debtor-creditor relationship between the victim and the criminal." Com. v. Mourar, 349 Pa. Super. 583, 504 A.2d 197, 208 (1986), vacated on other grounds, ____Pa.____, 534 A.2d 1050 (1987). See also In re Kohr, 82 B.R. 706, 711 (Bkrtcy. M.D. Pa. 1988) (probationary restitution not debt). If no debtor-creditor relationship exists, it is axiomatic that restitution payments cannot be discharged in bankruptcy.

In so stating, I well recognize that the statutory scheme for Chapter 13 bankruptcies is substantially different from Chapter 7; and I am mindful of the argument vigorously propounded by counsel for the bankrupts --and embraced by Judge

Scholl-- that the different schematic context compels a different result. And I must say that I find a certain inherent logic in the statutory syllogism to be found in the analyses of the Code's words by the Second Circuit and by Judge Scholl.[7]

But in construing the statute, it is to the Supreme Court to which I must ultimately turn, and by which I am

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[7]I am also aware of Judge Scholl's concern that "if the debtor is already paying all of his disposable income into a plan, it is theoretically and practically impossible that he will have anything left over to pay towards restitution." In re Johnson-Allen, 69 B.R. at 469. As Judge Mahoney points out, however, this assumes that money for criminal restitution payments would constitute disposable income. I agree with his observation that criminal restitution payments would, instead, "constitute a necessary expense that would be first subtracted in determining the debtor's disposable income available to pay debts under the plan." In re Cancel, 82 B.R. 674, 677 (Bkrtcy. N.D.N.Y. 1988) reversed on other grounds, 85 B.R. 677 (N.D.N.Y. 1988).

ultimately bound. "The law is, by definition precisely what the majority [of the Supreme Court] thinks, taking all things into account, it ought to be." Morrison v. Olson, 56 U.S.L.W. 4835, 4857 (June 29, 1988)(Scalia, J. dissenting)(emphasis in original).[8] The Supreme Court has forcefully declared its disapproval of the notion that the Code's definition of "debts" encompasses punishment inflicted pro bono publico for crimes committed -- i.e. restitution. Any differences between Chapters 7 and 13 are outweighed

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[8]Although the Supreme Court's declaration, doubting whether the Code's definition of "debt" encompasses restitution payments, is, admittedly, obiter dictum, there are many significant cases in the history of the Court's jurisprudential history in which language of the Supreme Court, although unequivocally dictum, has become settled and accepted doctrine. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2.L.Ed. 60 (1803).

by the clear, strong pronouncements of policy by the Highest Court of our land. I can only conclude that the statute says what they say it says.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

O R D E R

AND NOW, this 14th day of July, 1988, the order of the Bankruptcy Court in the above-captioned cases is REVERSED.

BY THE COURT:

/s/
ROBERT S. GAWTHROP, III J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

MEMORANDUM AND ORDER

DITTER, J. November 3, 1987

The Pennsylvania Department of Welfare appeals from a bankruptcy decision in two cases granting summary judgment in favor of the debtors and holding that a criminal restitution obligation is a claim dischargeable in a Chapter 13 bankruptcy, 11 U.S.C. § 1301-

1330.[1] In re Johnson-Allen, 69 Bankr. 461 (Bankr. E.D. Pa. 1986). Before addressing the merits of the appeal, however, I will order the Department of Public Welfare to show cause why it has standing to challenge the dischargeability in bankruptcy of the restitution obligations.

While the record in this bankruptcy appeal is far from complete,[2] it appears that debtors pleaded guilty to

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[1]The bankruptcy judge also held that all post petition restitution payments by the debtors were involuntary payments that must be remitted to the trustee. 11 U.S.C. §§ 522(g)(a), 522(b).

[2]The motions for summary judgment were decided solely on the basis of the unsworn affidavits of the debtors and counsel for the Department of Public Welfare. Central to the dispute are the restitution orders which are not part of the bankruptcy record.

public welfare fraud, 62 Pa. Cons. Stat. Ann. §481(a), were placed on probation, and were ordered to pay restitution to the County Probation Department on behalf of the victim, the Department of Public Welfare. This order of restitution was presumably made under 11 Pa. Cons. Stat. Ann. §1106(e) (Supp. 1987). Pursuant to this section, however, the victim has no right to payment of the restitution and can not enforce the restitution order.[3] Id. at 1106(f) (offender may be held in contempt or for violation of probation for failing to make restitution). See Commonwealth v. Mourar, 349 Pa. Super. 583, 504 A.2d 197 (1986)(order of restitution does not

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[3]Under the Bankruptcy Act, a creditor is defined as an entity that has a claim against the debtor. 11 U.S.C. §101(9). A "claim" is defined as a "right to payment." 11 U.S.C. §101(4).

create a debtor-creditor relationship between the victim and the criminal; therefore, a victim must pursue a separate civil action to compel payment of his losses) appeal granted, 511 Pa. 618, 515 A.2d 898 (1986); In re Pellegrino, 42 Bankr. 129 (D. Conn. 1984)(in analyzing the debtor-creditor relationship, each arm of the state, i.e., victim and enforcement agency, must be considered a separate entity). Moreover, in the cases cited by the parties, the challenge to the discharge of the restitution obligation was brought by the state agency that received the payments directly from the offender. E.g., Kelly v. Robinson, ____ U.S. ___, 107 S.Ct. 353 (1986); In re Pellegrino, supra; In re Button, 8 Bankr. 692 (W.D. N.Y. 1982).

If the restitution was ordered pursuant to section 1106, the Department of Public Welfare has no right to enforce the restitution award. Nevertheless, because the record is far from clear, I will give appellant an opportunity to file a brief in response to this memorandum.[4]

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[4]The parties may also want to address the effect, if any, of the bill passed by the United States Senate which would amend 11 U.S.C. §523(a) and §1328(a)(2) to exclude from discharge any debt "that to the extent that such debt arises from a violation by the debtor of a civil or criminal law enforceable by an action by a governmental unit to recover restitution ...." S. 548, 100th Congress, 1st Session (1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	CIVIL ACTION NO. 87-1032
LORRAINE JOHNSON-ALLEN and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
v.	:	
RUBY STEFFLER, a/k/a INGRID J. STEFFLER	:	

ORDER

AND NOW, this 3rd day of November, 1987, appellant Commonwealth of Pennsylvania, Department of Public Welfare is hereby ordered to show cause within 10 days in accordance with the accompanying memorandum why it is a creditor or is entitled to bring the underlying complaint to determine the dischargeability of debtor's criminal restitution obligations.

BY THE COURT:

/s/

J.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: LORRAINE JOHNSON-ALLEN	:	Chapter 13
Debtor	:	Bankruptcy No. 86-01239K
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE	:	
Plaintiff	:	Adversary No. 86-0463K
v.	:	
LORRAINE JOHNSON-ALLEN	:	
Defendant	:	
In re: RUBY STEFFLER a/k/a INGRID J. STEFFLER	:	
Debtor	:	Bankruptcy No.86-00205K
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	
Plaintiff	:	
v.	:	
RUBY STEFFLER a/k/a INGRID J. STEFFLER	:	
Defendant	:	Adversary No. 86-0464K

O P I N I O N

BY: THE HONORABLE DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE

These consolidated adversarial proceedings present the issues of whether

the liability of a Chapter 13 debtor to pay criminal restitution constitutes a "claim" dischargeable in the Chapter 13 case; and, assuming that the restitution obligation is a dischargeable claim, what remedies are available to the debtor to prevent collection of future payments and to recover post-petition payments made. We hold that a criminal restitution obligation does constitute a dischargeable "claim" and that the appropriate remedy is to direct the recipient of the restitution to remit all post-petition sums collected to the Trustee and to prevent the recipient from retaining future restitution remittances, but not, unless such directives are ignored, to enjoin any state proceedings or parties or to declare the restitution recipient to be in contempt of court.

These adversarial proceedings were filed separately by the Plaintiff, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE (hereinafter referred to as "DPW"), against each of the Debtors, LORRAINE JOHNSON-ALLEN[1] and RUBY STEFFLER, a/k/a INGRID J. STEFFLER, on May 19, 1986. Each of the Complaints which are prepared in identical form, aver that the Debtors pleaded guilty to several counts of prepetition welfare fraud and were ordered to make restitution payments to the County Probation Department on behalf of DPW. The relief sought in each Complaint was a declaration that the respective Debtors' restitution obligations were non-dischargeable, on three (3) separate

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[1]Our review of the file indicates that this Debtor utilizes a hyphenated last name and we shall therefore correct the caption to so indicate.

grounds: (1) They were within the scope of 11 U.S.C. §§ 523(a)(2), (a)(4), (a)(6), and/or (a)(7); (2) The "claim" of the DPW was not a "debt;" and (3) DPW "is immune from suit and this court is foreclosed from discharging" DPW's "claim" by the Eleventh Amendment to the federal Constitution.

STEFFLER filed an Answer and Counterclaims on July 18, 1986, and JOHNSON-ALLEN filed an Answer on June 30, 1986, and thereafter, on August 26, 1986, an Amended Answer and Counterclaims, the latter of which virtually identical to that filed by STEFFLER. In these pleadings, the Debtors averred that, since the filing of their Petitions on January 14, 1986, and March 14,1986, respectively, they had made payments on the restitution obligations and they therefore sought damages against DPW for

violation of the automatic stay imposed by 11 U.S.C. § 362 and sought to avoid the postpetition transfers to DPW per 11 U.S.C. §§ 549, 522(h), and 522(g)(1).

The matters were listed for trial before us on September 9, 1986, and were continued to October 9, 1986. Only Counsel for the Debtors appeared on the latter date, and indicated that they were not prepared to try the case that day, but believed that the matters raised exclusively legal issues which could be resolved on cross-motions for summary judgment.

We therefore entered an Order on October 14, 1986, consolidating the adversarial matters for all purposes; directing the Debtors to either prepare a Stipulation of Facts or a Motion for Summary Judgment and file same with a Brief on or before November 10, 1986;

and directing DPW to file any materials in response to the Debtors' filing on or before December 12, 1986.

On November 10, 1986, the Debtors opted to file a Motion for Summary Judgment, accompanied by their personal Unsworn Declarations. Coincidentally, two (2) days later, the United States Supreme Court filed one of the initial Opinions of the term, Kelly v. Robinson, ___ U.S. ____, 107 S.Ct. 353 (1986), which reversed the Debtors' principal supporting authority, In re Robinson, 776 F.2d 30 (2d Cir. 1985). Therefore, we issued an Order according the Debtors an opportunity to address the pertinence of Kelly v. Robinson in a Supplemental Brief to be filed on or before November 28, 1986, and holding the December 12, 1986, date as the deadline for DPW's reply. On November

20, 1986, the Debtors directed a letter to the Court addressing the impact of the Supreme Court's decision in lieu of a Supplemental Brief.

On December 12, 1986, DPW opted to file a Cross-Motion for Summary Judgment, attaching thereto an Unsworn Declaration of Mary B. Sieverling, Assistant Counsel for DPW.

The parties, by their Cross-Motions for Summary Judgment, indicate agreement that there are no genuine issues of material fact to be resolved in the disposition of these cases, and the Court also agrees that this matter is appropriate for disposition in this procedural manner per Bankruptcy Rule 7056 and Federal Rule of Civil Procedure 56. This Court therefore need not and will not make separate Findings of Fact,

but shall herein fill out the record by reference to uncontested averments in the respective Unsworn Declarations accompanying the Cross-Motions for Summary Judgment.

On June 18, 1985, JOHNSON-ALLEN pleaded guilty to four (4) counts of welfare fraud for receiving $6,300.00 in unauthorized benefits between April 11, 1980, and October 30, 1982. The sentence of the said Debtor was probation and repayment of the $6,300.00 in payments of $10.00 monthly from July, 1985, to December, 1985, and $20.00 monthly thereafter. The said Debtor made all of these payments through her filing date. Shortly thereafter, both she personally and her counsel, by letter, advised DPW and the County Probation Department of her bankruptcy filing and indicated that they believed that the bankruptcy stayed

collection of the restitution obligation, which would be covered by her Chapter 13 Plan and hence ultimately discharged in these proceedings upon completion of her Plan payments. Upon advice from the Probation Department that it did not accept the reasoning of her or her Counsel and advice that she would "get in trouble" if she ceased making payments, the said Debtor, upon advice of Counsel, resumed payments pending disposition of this proceeding.

The facts of STEFFLER's matter are similar, and are hence recited only when divurgent from the facts relating to JOHNSON-ALLEN. On January 17, 1984, STEFFLER pleaded guilty to welfare fraud which occurred between June 8,1979, and June 11, 1981. The said Debtor was similarly placed on probation and ordered

to make restitution in the amount of $5,506.64 at the rate of $20.00 monthly, probably commencing in early 1984. It should be noted that STEFFLER listed DPW as a creditor in the amount of $18,000.00 and that DPW filed a Proof of Claim in this amount, indicating that she probably had received sums in addition to those ordered to be repaid in her sentence of restitution. The said Debtor and her Counsel, by certified letter, indicated to the County Probation Department, shortly after the filing, that STEFFLER would cease payments because of her intention to deal with this obligation in her Chapter 13 Plan. Despite subsequent correspondence from Counsel citing the decision in In re Robinson, the County District Attorney scheduled a probation violation hearing for the said Debtor. At this point, upon advice of Counsel, STEFFLER resumed her payments.

The starting point of our discussion is that section of the Bankruptcy Code setting forth the scope of debts covered by a Chapter 13 discharge, which is as follows:

> § 1328. Discharge
>
> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--
>
> (1) provided for under section 1322(b)(5) of this title; or
>
> (2) of the kind specified in section 523(a)(5) of this title. (emphasis added)

This provision, pertinent to Chapter 13 discharges, can be contrasted with the exceptions to discharge cited in 11 U.S.C. § 523(a), pertinent to discharges pursuant to Chapter 7 and 11,

and Chapter 13 "hardship" discharges pursuant to 11 U.S.C. § 1328(b). Among the exceptions cited in 11 U.S.C. § 523(a) is, in 11 U.S.C. § 523(a)(7), an exception for "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit," including certain tax liabilities.

In Kelly v. Robinson, the Supreme Court resolved a previous split among court decisions, the most prominent of which was the Second Circuit Court of Appeals decision to the contrary, which it reversed, as to whether 11 U.S.C. § 523(a)(7) prevented discharge of restitution imposed in connection with a state criminal sentence in a Chapter 7 bankruptcy case. However, albeit with certain language which is not comforting to the position

of the Debtors here, the Court, apparently intentionally, left open the question as to whether such restitution is a "debt" (and it, might be added, fines or court costs imposed on criminal defendants as well), and hence whether such obligations are dischargeable in a Chapter 13 bankruptcy case.

It is clear to us that, except for the issue of whether charges imposed in a criminal case are a "debt" and whether, concomitantly, the state prosecutorial bodies and/or the victims of crimes who are designated as recipients of restitution have a "claim" against the criminal defendants, the contentions of DPW set forth herein can be dismissed summarily.

The first contention, that the restitution obligation of the Defendants

is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2), (a)(4), (a)(6), or (a)(7), as DPW apparently concedes in its Brief, has no merit, because these provisions apply only to Chapter 7 cases, and the instant cases are maintained pursuant to Chapter 13. This principle, if not clear from a reading of the Code itself, is emphasized in such cases as In re DeSimone, 25 B.R. 728, 729 (E.D.Pa. 1982), where our district court, in a bankruptcy appeal, states that

> debts under [another section of 11 U.S.C. § 523(a)] are not included in the list of debts which are not dischargeable under 11 U.S.C. § 1328(a). The law is clear . . . that debts which fall within the scope of [§ 523(a)] may still be discharged pursuant to 11 U.S.C. § 1328(a).

This principle is also enunciated, specifically as to 11 U.S.C. § 523(a)(7), by Judge Goldhaber in his

recent decision in In re Smith, 58 B.R. 78, 80-81 (Bankr. E.D.Pa. 1986), rev'd on other grounds, 66 B.R. 244 (E.D.Pa. 1986), as follows:

> The dischargeability in bankruptcy of an individual's debts is determined, in part, by reference to 11 U.S.C. § 523. The discharge of an individual in chapter 7 or 11 is limited by the ten subsections of § 523(a), 11 U.S.C. §§ 727(b) and 1141(d)(2). The discharge in a chapter 13 case discharges a debtor from all debts under 11 U.S.C. § 502 except certain long term debts or debts of the type specified in § 523(a)(5) (alimony, maintenance or child support). 11 U.S.C. § 1328(a). A criminal fine, such as one issued by a traffic court, would be excepted by an individual's chapter 7 or 11 discharge according to 11 U.S.C. § 523(a)(7) while a debtor would be exonerated from paying such a debt under the terms of a chapter 13 discharge.

Cases consistent with this result include the following: In re Sturgeon, 51 B.R. 82 (Bankr. S.D.Ind. 1985) (liability incurred by debtor while motorist intoxicated by alcohol, excepted by 11

U.S.C. § 523(a)(9)); In re Richards, 50 B.R. 339 (Bankr. D.D.C. 1985) (federal income tax liability); In re Young, 10 B.R. 17 (Bankr. S.D.Cal.) (traffic fines); and In re Hudson, 9 B.R. 363. (Bankr. N.D.Ill. 1981) (welfare fraud claims).

There are, moreover, important logical reasons for treating debtors in cases maintained under Chapter 13 differently from those in cases maintained under Chapter 7 which are relevant to our disposition here. In a Chapter 13 case, the debtor is obliged to make periodic payments to a Trustee, who will distribute the funds received to all creditors who file allowed Proofs of Claim. See 11 U.S.C. § 1322(a). The Plan must, inter alia, be proposed good

faith, see 11 U.S.C. § 1325(a)(3),[2] and, upon the objection of either the Trustee or an unsecured creditor, the Plan must provide "that all of the debtor's projected income in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan," 11 U.S.C. § 1325(b)(1)(B). Further, the trustee or any unsecured creditor can move to increase the payments if the financial circumstances of a debtor change for the better during the course of the plan period. 11 U.S.C. §1329(a). Morever,

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[2]See In re Gathright, Bankr. No. 86-02118K, slip op. at 16, 18 (Bankr. E.D.Pa., Opinion filed Nov. 24, 1986), where we observed that the dishonesty of the Debtor in acquiring a debt and the fact that the debt may be non-dischargeable in a Chapter 7 case are not badges of "bad faith," per 11 U.S.C. § 1325(a)(3).

any creditor has a right to attend the Meeting of Creditors, interrogate the Debtor, and file Objections to the Plan if the creditor believes that it is not in compliance with the Code in any way. Thus, prosecuting authorities, as well as recipients of restitution orders, both of whom should be listed as creditors by the careful debtor, would have an opportunity to contest, inter alia, the debtor's ability to pay a larger percentage of his or her income towards the claim than proposed under a plan. Therefore, it is logical for the Code to provide, as it does, that consideration of whether a debt would be nondischargeable in a Chapter 7 case, per 11 U.S.C. §§ 523(a)(2), (a)(4), (a)(6), or (a)(7), is entirely irrelevant to the determination of whether an

obligation is dischargeable in a Chapter 13 case. See In re Ellis, 66 B.R. 821 (N.D.Ill. 1986).

The third ground invoked by DPW as a basis for its position that the Defendants' obligation is nondischargeable, i.e., the Eleventh Amendment, can similarly be disposed of summarily. As the Court of Appeals recently held in In re Vasquez, 788 F.2d 130, 132 (3d Cir. 1986), the Bankruptcy Code, at 11 U.S.C. § 106(c), which has been the subject of "broad interpretation," contains a waiver of sovereign immunity. See also Gardner v. Pennsylvania Dep't of Public Welfare, 685 F.2d 106 (3d Cir.), cert. denied, 459 U.S. 1092 (1982). As the Court points out in Vasquez, in other instances, the courts have not been shy about discharging obligations to repay

government benefits which debtors were overpaid. See Lee v. Schweiker, 739 F.2d 870 (3d Cir. 1984).[3]

We therefore turn to the difficult issue presented by this case, i.e., whether the restitution obligations of the Debtors to DPW constitute "claims." We note that, prior to the decision of the Supreme Court in Kelly v. Robinson we could locate no generally-reported Chapter 13 case decision in which a court had held that criminal restitution (or other fines and penalties

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[3]We would, moreover, be hard-pressed to label the fraud of indigent persons seeking to recover additional benefits to provide necessities to their families, like the Debtors here, as more culpable than any other acts of fraudulent misappropriation by debtors. Nor is the government necessarily a more sympathetic victim than private fraud victims.

imposed in a criminal case) were not "claims" and hence not dischargeable. The question is whether the Court's dictum in Kelly v. Robinson in which it states that it has "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)" of the Bankruptcy Code, 107 S.Ct. at 361, casts a sufficient shadow to overrule all prior decisions and the policy arguments expressed hereinbefore to the contrary. We think not.

We note at the outset that both the Second Circuit Court of Appeals and the Supreme Court devoted far more attention to the issue of whether the restitution claim in issue was a "debt" or "claim" than they did to the ultimately decisive issue of whether 11 U.S.C. § 523(a)(7) applied to restitution. Nevertheless, the Court refuses

to rest its decision on the issue of whether restitution is a "claim," but rather follows the language quoted at 107 S.Ct. 361 above by expressly stating that "we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of criminal sentence." This holding specifically limits the scope of Kelly v. Robinson to Chapter 7 cases to which, as is indicated above, § 523(a)(7) exclusively applies. Moreover, it can scarcely be doubted that the Court was aware that its chosen basis for its ruling did not extend the scope of its decision to Chapter 13 cases, as the dissent expressly points out that the Court's approach leaves this issue open. See 107 S.Ct. at 366 n.6.

The Court, in its decision, relied heavily upon precedent under the Bankruptcy Act which held that criminal penalties were not dischargeable in bankruptcy, which it found, by its silence, Congress had implicitly meant to be read into the Code, and by the "'fundamental policy against federal interference with state criminal prosecution'" arising from Younger v. Harris, 401 U.S. 37, 46 (1971). Id. at 36[illegible]. See also In re Davis, 691 F.2d 176, 179 (3d Cir. 1982).

We do note that the Court's reliance on the principle that the Code reflected an intention to accept the precedent under the Act which established the definition of "debt" is strained. The Code merely states that "'debt' means liability on a claim." 11 U.S.C.

§ 101(11). It would seem that the analysis of the definition of a "debt" should then lead to the consideration of the definition of "claim," Which appears at 11 U.S.C. § 101(4) as follows:

> (4) "claim" means--
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

In Ohio v. Kovacs, 469 U.S. 274, 278-80 (1985), the Court, by contrast, focuses on the definition of "claim" rather than the term "debt," and recites convincing legislative history

for the proposition that Congress, in the Code, drafted a far broader definition than was set forth in the cases interpreting the Act and hence that "Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision . . . when it desired to do so." Id. at 279.

Thus, Collier, in describing the Code definition of "claim," states that "[t]he effect of the definition is a significant departure from prior law," and that "[t]he Code defines the term much more broadly" than did the Act. 2 COLLIER ON BANKRUPTCY, § 101.04, at 101-19 (15th ed. 1986). The only limitation from the intention "to give 'claim' the broadest interpretation," which Collier notes in support of the statement of the Court in Ohio v. Kovacs

that it "knew how to limit the application of a provision when it desired to do so," is the specific exception in § 101(4)(B) as to "an equitable remedy for a breach of performance with respect to which such a breach does not give rise to a right to payment." Id. at 101-21 (emphasis added).

Another source of Code support for an absence of Congressional intention to exclude all criminal penalties from bankruptcy discharge is, ironically, § 523(a)(7) itself, which excepts from its scope not only sums which are "not compensable for actual pecuniary loss," but also any sum otherwise within the scope of § 523(a)(7) "imposed with respect to a transaction or event that occurred before three years before the

date of the filing of the petition" (emphasis added).[4] It is difficult to understand what purpose Congress would have served by exempting criminal penalties less than three (3) years old from discharge if it meant to exempt all such penalties from discharge.

Although the Briefs of both parties were of very little assistance to the Court in its endeavor to do so, we have researched numerous cases touching upon the issue of the response

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[4]It should be noted that, in contrast to the facts presented in Kelly v. Robinson, where the debtor filed her bankruptcy petition within three (3) months of her conviction, the criminal penalties assessed against the Debtors here were dated and could apparently have been discharged, even in a Chapter 7 case, under the terms of 11 U.S.C. § 523(a)(7)(B).

of courts to arguments and counter-arguments that bankruptcy filings did or did not affect criminal penalties, usually in the context of "bad check" cases. As we noted above, we have discovered a variety of responses from courts in Chapter 7 and Chapter 11 cases, but a uniformity in the reported Chapter 13 cases holding that criminal penalties were dischargeable. We do not believe that, in Kelly v. Robinson, the Court meant to overrule all of these decisions.

We acknowledge a number of Chapter 7 cases holding that the obligation of a debtor to pay restitution is not a "debt." Most notable is In re Oslager, 46 B.R. 58 (Bankr. M.D.Pa. 1985), which, because it involves a debtor convicted of welfare

fraud in this Commonwealth, like the Debtors here, demands a subsequent extended discussion. Other cases reaching a similar conclusion are In re Vik, 45 B.R. 64 (Bankr. N.D.Iowa 1984); In re Pellegrino, 42 B.R. 129 (Bankr. D.Conn. 1984); In re Mead, 41 B.R. 838 (Bankr. D. Conn. 1984); In re Magnifico, 21 B.R. 800 (Bankr. D.Ariz. 1982); and In re Button, 8 B.R.692 (Bankr. W.D.N.Y. 1981). Interestingly, all of these cases rely exclusively on the issue which the Supreme Court, in Kelly v. Robinson, indicated that it need not decide, i.e., whether the criminal penalties were a "debt," and, of these cases, only Pellegrino relies, even in the alternative, on the conclusion that 11 U.S.C. § 523(a)(7) prevents the discharge of a debtor's restitution obli-

gation, which is of course the ultimate basis for the ruling in Kelly v. Robinson.

An almost equal number of Chapter 7 cases hold to the contrary. These include In re Farrell, 43 B.R. 115 (M.D.Tenn. 1984) (district court modifies order of bankruptcy court enjoining entire criminal proceeding and merely enjoins prosecutor and crime victim from seeking restitution); In re Vandrovec, 61 B.R. 191 (Bankr. D.N.D. 1986)(restitution to United States Commodity Credit Corporation held dischargeable); In re Vohs, 58 B.R. 323 (Bankr. D.Mass. 1986) (restitution held dischargeable on consideration of, inter alia, § 523(a)(7) objections to dischargeability by crime victim); In re Brown, 51 B.R. 57 (Bankr. E.D.Ark. 1985)(crime

victim enjoined from receiving restitution); In re Allman, 43 B.R. 840 (Bankr. D.Colo. 1984) (prosecutor enjoined from seeking to revoke debtor's probation for failure to pay restitution); In re Brown, 39 B.R. 820 (Bankr. M.D.Tenn. 1984) (prosecutor enjoined from seeking restitution and crime victim enjoined from seeking restitution); In re Redenbaugh, 37 B.R. 383 (Bankr. C.D.Del. 1984) (crime victim enjoined from seeking restitution); In re Curly, 25 B.R. 260 (Bankr. E.D.Pa. 1982) (one of several decisions of former Chief Judge Goldhaber of this Court which enjoins criminal proceedings per 11 U.S.C. § 105(a) where it is found that the nature of the proceeding was to collect a debt); In re Strassmann, 18 B.R. 346 (Bankr. E.D.Pa. 1982)(per TWARDOWSKI, J.)(crime victim enjoined

from continuing or commencing criminal proceedings against debtor).

The few Chapter 11 cases located, which are subject to the same dischargeability provisions as Chapter 7, 11 U.S.C. § 1141(d)(2), similarly produce a mixed result. In In re First Texas Petroleum, Inc., 52 B.R. 322 (Bankr. N.D. Tex. 1985), the court denies an injunction and suggests that the bankruptcy courts cannot restructure a state criminal sentence. However, in In re Landstrom Distributors, Inc., 55 B.R. 390 (Bankr. C.D.Cal. 1985), the court holds that the automatic stay protects the debtor from collection of fines, and in In re Ohio Waste Services, Inc., 23 B.R. 59 (Bankr. S.D.Ohio 1982), the court enjoins both the prosecutor and the crime victim from proceeding to attempt to collect restitution from the debtor.

We have, however, located five (5) generally reported cases which raise the issue of collection of criminal penalties in Chapter 13 cases. Unlike cases under the other Chapters, these cases are uniform in providing at least some relief to the debtors involved in these cases, as follows: In re Gilliam, 67 B.R. 83 (Bankr. M.D.Tenn. 1986) (criminal penalties held to be debts subject to "discharge injunction" of 11 U.S.C. § 524, although not subject to 11 U.S.C. § 362). In re Heiney, 58 B.R. 930 (Bankr. C.D.Cal. 1986)(prosecutor enjoined from collecting restitution; crime victim of embezzlement held to have no enforceable claim against debtor); In re Holden, 26 B.R. 789 (Bankr. M.D.Tenn. 1982) (crime victim enjoined from accepting restitution); Lawson v. Boczonadi, 22 B.R. 100 (Bankr.

S.D.Ohio 1982) (crime victim enjoined from receiving restitution, but not from testifying against debtor in criminal proceeding); In re Barnett, 15 B.R. 504 (Bankr. D. Kan. 1981) (court refused to issue injunction, but declared that bankruptcy stays collection of restitution). Cf. In re Ellis, supra (welfare department enjoined from maintaining civil action to recover overpayments).

We believe that it is not coincidental that courts faced with Chapter 13 cases would find criminal restitution to be dischargeable because of the very significant difference in the broad Chapter 13 discharge, justified, as indicated above, by the consideration that, in a Chapter 13 case, the crime victim is to be the recipient of at least a portion of the payments to which he is due. Several

considerations which are starkly emphasized in the context of a Chapter 13 case bring this out. One is the concept that the entry and enforceability of a restitution order are dependent upon the ability of the defendant to pay. See Commonwealth v. Walton, 326 Pa.Super. 492, 494, 474 A.2d 348, 349 (1984); and Commonwealth v. Valent, 317 Pa. Super. 145, 149-50, 463 A.2d 1127, 1129 (1983). Hence, restitution is payable only if the defendant has funds available to pay in any event. The supervision of the bankruptcy court over the remittance of plan payments may, in practical terms, result in more significant payments to crime victims than they might otherwise realize.

Another consideration is the concept that no creditors, irrespective of the nature of the debts owed to them, should be granted a preference or a priority over any other creditors. A third is recognition that, if the debtor is already paying all of his disposable income into a plan, it is theoretically and practically impossible that he will have anything left over to pay towards restitution. All of these considerations add up to the conclusion that the crime victim must share, with other creditors, acceptance of only that which the debtor is financially able to pay. Melding these considerations with a final consideration - that a Chapter 13 debtor is to receive the broadest "fresh start" possible, a concept deeply regarded since Local Loan Co. v. Hunt, 292 U.S. 234 (1934) - leads to the unmistakeable

conclusion that the foregoing Chapter 13 cases are correct in requiring that repayment of financial penalties arising from criminal proceedings must be a part of the debtor's Plan, along with the debtors' other legitimate debts.

As we indicated earlier, we are obliged to give a more extended discussion of the decision in Oslager, supra, as it does involve a very similar claim by DPW to that made here, although in the context of a Chapter 7 case. We believe that the result there, while consistent with the decision in Kelly v. Robinson and hence correct on its facts, should not be carried over to the facts of the instant matter.

We disagree with several conclusions stated by Judge Gibbons in that case, which were unnecessary to the result attained.

First, we do not agree that the purpose of restitution, per 18 Pa. C.S. § 1106, the pertinent section of the Pennsylvania Crimes Code, is solely to rehabilitate the offender rather than to, in addition, compensate the victim. The case quoted by Judge Gibbons for this principle, Commonwealth v. Wood, 300 Pa.Super. 463, 467, 446 A.2d 948, 949-50 (1982), does not, with all due respect, so hold. Rather, the court holds that, in entering orders of restitution, the state courts must consider the following four (4) factors:

> (1) the amount of the loss suffered by a victim; (2) the fact that such loss was caused by conduct of the defendant; (3) that the amount awarded does not exceed the defendant's ability to pay; and (4) the type of payment that will best serve the needs of the victim and the capabilities of the defendant. . . .

See also, e.g., Commonwealth v. Valent, 317 Pa.Super. 145, 149, 463 A.2d 1127, 1128 (1983). The first, second, and fourth considerations all relate to compensation of the loss suffered by the victim as a result of the crime, rather than or in addition to rehabilitation of the offender. See Commonwealth v. Balisteri, 329 Pa.Super. 148, 154-58, 478 A.2d 5, 8-10 (1984) (court must frame restitution award to measure compensable damages of victim). It is our belief that the purported purpose of the Crimes Code should not be a factor at all but, to the extent that it is, we cannot agree that compensation of the victim is not at least one of the principal purposes of restitution.

Secondly, we do not agree that a conclusion that restitution (or criminal fines and penalties) are dischargeable necessarily violates the principles of equity, comity, and federalism set forth in Younger v. Harris, supra. Instead, we believe that the Third Circuit Court of Appeals, in In re Davis, has set forth the path that bankruptcy courts must follow in framing relief in such matters which is consistent with the considerations in Younger v. Harris. We intend to adhere to the teachings of Davis in framing relief.

Finally, we believe that Judge Gibbons was influenced by the fact that the debtor, in Oslager, filed a Chapter 7 case to attempt to completely discharge her obligation within a month of

her having pleaded guilty of welfare fraud. Principles established in such a factual setting should not necessarily carry over to debtors who, after making considerable payments, seek an adjustment of their restitution obligation via a Chapter 13 Plan, like the Debtors here.

We therefore conclude that not only did the Supreme Court, in Kelly v. Robinson, not rule that criminal financial penalties were not dischargeable in a Chapter 13 bankruptcy, but it is unlikely that the Court, taking all of the foregoing considerations into account, would do so. Thus, we shall not do so and rule that the restitution due from the Debtors here is dischargeable in their Chapter 13 Plans and that the Debtors, and not DPW, are entitled to summary judgment.

Still remaining for disposition are the issues of the Counterclaims of the Debtors and the relief to be granted. Since we conclude that the Debtors' restitution payments are dischargeable debts, it is clear that the payments by the Debtors to the Probation Department, which undoubtedly have been or will be remitted to DPW subsequent to their respective filings, were postpetition transfers within the scope of 11 U.S.C. §§ 549(a)(1) and (a)(2)(B).

However, DPW questions whether, irrespective of this fact, the Debtors, as opposed to the Trustee, may avoid the transfers per 11 U.S.C. §§ 522(h) and (g)(1)[4] because it is contended that

---

[4]These Code sections provide as follows:

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

> (g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--
>
> (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
>
> (B) the debtor did not conceal such property; . . .
>
> (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--
>
> (1) such transfer is avoidable by the trustee under
>
> section 544, 545, 547, 548, 549, or 724(a) of this title or

(FOOTNOTE CONTINUED)

the Debtors made a "voluntary choice" to continue their restitution payments post-filing, and hence that the transfers were "voluntary." In the instant factual settings, we cannot agree. It is established in this Court that only when a debtor effects a transfer voluntarily when he acts

> "free from the persuasive influence of another . . . of her own free will to transfer property to the creditor. . . . [and] not . . . where a creditor has harassed, insulted or shamed a debtor into transferring property to the creditor." In re Seidel, 27 B.R. 347, 351 (Bankr. E.D.Pa. 1983) (per TWARDOWSKI, J.) (quoting In re Reaves, 8 B.R. 177, 181 (Bankr. D.S.D. 1981).

(FOOTNOTE CONTINUED)

> recoverable by the trustee under section 553 of this title; and
>
> (2) the trustee does not attempt to avoid such transfer.

See also In re Taylor, 8 B.R. 578 (Bankr. E.D.Pa. 1981) (per GOLDHABER, J.)

In Seidel the husband-Debtor undoubtedly voluntarily returned an encumbered truck, but this court held that his ignorance that his act of doing so would cause him to lose his equity in the truck rendered the transfer involuntary for purposes of setting aside the transfer by means of § 522(g)(1). In Reaves, the Debtor voluntarily signeda mortgage in favor of a bank to secure a debt of her husband, but the court held that the fact that she was pressured to do so by a bank employee (the only element of "pressure" was, apparently, repeated but businesslike requests that she do so) rendered this transfer "involuntary." In Taylor, the Debtor made a payment on a

debt only after harassment from a collection agency. Judge Goldhaber held that such a payment, not made by the Debtor of her own unfettered free will, was "involuntary" for purposes of 11 U.S.C. §§ 522(g)(1) and (h).

Here, it is apparent that the only "choice" which the Debtors had was to resume making payments to the Probation Department or face incarceration. The mere possibility that incarceration would result if the payments were not made we hold to be sufficient to render the payments involuntary. The facts here, where the Debtors stopped payments and resumed only when they and their counsel were unable to convince the Probation Department that, under the circumstances, payments should not be remitted, present, to our thinking, the

strongest possible case that the transfers were involuntary. Compared to the instant facts, the "pressure" put upon the debtors in Taylor and Reaves was de minimis.

Therefore, we are forced to conclude that the Debtors may set aside the postpetition transfers to DPW.

However, in framing an Order here, we must be sensitive to the interests of comity, equity, and federalism, per the Davis decision, and we must be assured that the result will be consistent with the scheme established in the administration of Chapter 13 bankruptcies. We shall therefore, at this time, refrain from issuing any injunction directed at either the County Probation Department or DPW. Like the Davis court, "[w]e decline to presume" that the County Probation Department and

DPW "will disregard the obligation imposed upon them by the federal Constitution" to heed the orders of this Court. See 691 F.2d at 178. We shall act further only if these parties do not heed our directives as to their obligations in light of this Opinion. Accord: In re Gilliam, supra, 67 B.R. at 87.

We also decline the invitation of the Debtors to hold DPW in contempt. In Allman, supra, the contempt remedy was rejected because the criminal proceeding was not enjoined, and in Redenbaugh contempt was withheld because of the absence of bad faith on the part of the crime victim. Here, we also decline to enjoin the state court proceedings, and we find no evidence of bad faith on the part of DPW. This is obviously an area of the law in which

the applicable principles are not settled and, although DPW's failure to cite Oslager may indicate its lack of reliance upon it, we cannot overlook the presence of a case so analogous in its closely factual matrix to the case at bar in which an eminent jurist appears to have reached a conclusion contrary to that reached by us. Of course, we fully anticipate the cooperation of DPW in any other similar matters before us in the future now that our views have been expressed, and different consequences would ensue if DPW repeated this conduct as to other Chapter 13 debtors in the future.

For the foregoing reasons, we also decline to find DPW's conduct, although possibly in violation of the

automatic stay, characterized by the element of willfulness, which is required to impose damages under 11 U.S.C. § 362(h).

The only remedy we shall order is that DPW remit the postpetition payments which it has or will receive to the Chapter 13 Trustee, to be distributed in accordance with the Debtors' respective Plans. We shall also accord DPW a thirty-day extension of the time to file a Proof of Claim in the JOHNSON-ALLEN case, which, unlike the STEFFLER case, we note has not been done even though the bar dates have passed. We believe that so ordering, in circumstances where a creditor in good faith believed that such a filing would be unnecessary would be "in the interest of justice and . . . will not unduly delay the administration"

of these cases, per Bankruptcy Rule 3002(c)(2).

An Order accomplishing the foregoing will be entered.

/s/
DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE
3722 United States Court House
Philadelphia, PA 19106-1763

Dated at Philadelphia, PA,
this 23rd day of January, 1987.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: LORRAINE JOHNSON-ALLEN Debtor	:	Chapter 13 Bankruptcy No. 86-01239K
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE Plaintiff	:	Adversary No. 86-0463K
v. LORRAINE JOHNSON-ALLEN Defendant	:	
In re: RUBY STEFFLER a/k/a INGRID J. STEFFLER Debtor	:	Bankruptcy No. 86-00205K
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE Plaintiff	:	
v. RUBY STEFFLER a/k/a INGRID J. STEFFLER Defendant	:	Adversary No. 86-0464K

O R D E R

AND NOW, this 23rd day of January, 1987, upon consideration of the Cross-Motions of the parties for Summary

Judgment, the pleadings, and the Unsworn Declarations and the Briefs submitted by the parties, it is hereby ORDERED AND DECREED as follows:

1. The Plaintiff's Motion for Summary Judgment in these matters is DENIED, and the Debtors' Motion for Summary Judgment is GRANTED in part.

2. It is declared that the restitution obligations of the Debtors to DPW are dischargeable debts, and the parties are directed to proceed in accordance with this declaration hereinafter.

3. DPW shall remit all postpetition payments received by it now or in the future on account of the Debtors' restitution obligations to the Standing Chapter 13 Trustee, James J. O'Connell, Esquire, within twenty (20) days from this Order or upon ten (10) days from receipt of same.

4. DPW shall be accorded an extension of time until February 20, 1987, to file a Proof of Claim in the JOHNSON-ALLEN bankruptcy case.

5. All requests of the Debtors for relief in the nature of contempt or pursuant to 11 U.S.C. § 362(h) are DENIED, without prejudice to the Debtors to seek such relief in the future if DPW does not proceed in accordance with the accompanying Opinion.

/s/
DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE
3722 United States Court House
Philadelphia, PA 19106-1763

SEE MAILING LIST ATTACHED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 28, 1989

TO: David A. Searles, Esq.*
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Harris R. Brumberg, Esq.
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NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case Nos. 88-1610 & 881635 and copies are enclosed herewith.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1610 and 88-1635

In re: LORRAINE JOHNSON-ALLEN

Commonwealth of Pennsylvania
Department of Public Welfare

v.

LORRAINE JOHNSON-ALLEN
In re: RUBY STEFFLER a/k/a
INGRID J. STEFFLER
Commonwealth of Pennsylvania
of Public Welfare Department

v.

RUBY STEFFLER A/K/A INGRID J. STEFFLER,
LORRAINE JOHNSON-ALLEN and RUBY STEFFLER,
Appellants

In re: EDWARD and DEBORA DAVENPORT
Edward and Debora Davenport

v.

Commonwealth of Pennsylvania,
Department of Public Welfare,
and Court of Common Pleas of
Bucks County, and Edward Sparkman,
Trustee, Edward and Debora Davenport,
Appellants

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENSBERG, HUTCHINSON, SCIRICA, COWEN NYGAARD, and ROSSEN, Circuit Judges

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.**

By the Court,

/s/
Chief Judge

DATED: April 27, 1989

*Senior Judge Rosenn as to panel rehearing only. ** Judges Greenberg and Hutchinson would grant rehearing.

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
AUG 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

SL21 PAGE 87

NUMBER 89-156

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,

Petitioners,

v.

EDWARD J. & DEBORA A. DAVENPORT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a restitution obligation to repay wrongfully received funds, imposed as a condition of probation in a state criminal proceeding, is a claim that may be provided for under Chapter 13 of the Bankruptcy Code.

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NUMBER 89-156

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, et al.,

Petitioners,

v.

EDWARD J. & DEBORA A. DAVENPORT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Edward J. and Debora A. Davenport respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

With one exception, respondents accept the petitioner's Statement of the Case.

Petitioner mischaracterizes the Court's reason for granting certiorari in Kelly v. Robinson, 479 U.S. 36 (1986). Certiorari was not granted in that case to determine whether a restitution obligation was a debt. Rather, as stated by Justice Powell in the opening paragraph of the Court's opinion in Kelly, review was granted to decide whether such obligations were dischargeable in proceedings under Chapter 7 of the Bankruptcy Code.

The instant case presents a question heretofore considered only by a single court of appeals. Unless and until there is a split among the circuits, the Court need not reach the issue.

REASONS WHY THE PETITION SHOULD BE DENIED

I. No Conflict Among The Circuits Is Created By The Ruling Of The Court Of Appeals

No other court of appeals has reached the question decided by the Third Circuit Court of Appeals below sub. nom. In re Johnson-Allen, 871 F.2d 421 (3d Cir. 1989); Pet. App. 1a-58a. Most of the other courts that have considered the issue have ruled in accordance with the Third Circuit that restitution is a debt which may be provided for in a Chapter 13 bankruptcy.[1/]

1/ In re Robinson, 776 F.2d 30 (2d Cir. 1985), rev'd on other grounds sub. nom. Kelly v. Robinson, 479 U.S. 36 (1986); In re Cancel, 85 B.R. 677 (N.D.N.Y. 1988); In re Heincy, 78 B.R. 246 (Bankr. 9th Cir. 1987) rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988); In re Hackney, 83

Footnote continued.

The cases cited by the Commonwealth in its petition are not in conflict with the decision of the Court of Appeals. In U.S. v. Alexander, 743 F.2d 472 (7th Cir. 1984) and U.S. v. Carson, 669 F.2d 216 (5th Cir. 1982), the debtor had obtained a discharge of the underlying debt prior to the criminal trial that resulted in his conviction and sentence of restitution. Because the restitution order had not been entered prior to the discharge, it could not have been listed as a debt in the debtor's schedules. Therefore, the courts correctly

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B.R. 20 (Bankr. N.D.Cal. 1988); In re Cullens, 77 B.R. 825 (Bankr. D.Colo. 1987); In re Brown, 39 B.R. 820 (Bankr. M.D.Tenn. 1984); In re Holder, 26 B.R. 789 (Bankr. M.D.Tenn. 1982); In re Barnett, 15 B.R. 504 (Bankr. D.Kan. 1981); In re Hudson, 9 B.R. 363 (Bankr. N.D.Ill. 1981). Contra, In re Norman, 95 B.R. 771 (Bankr. D.Colo. 1988); In re Kohr, 82 B.R. 706 (Bankr. M.D.Pa. 1988).

concluded that the earlier discharge of the underlying debt in no way interfered with the sentencing court's prerogative to order restitution.

Nor is this a case involving a bankruptcy court's power to enjoin a state court criminal proceeding. As a result, the federalism concerns embodied in Younger v. Harris, 401 U.S. 37 (1971), are not presented. The courts below entered no coercive orders which would impede the Pennsylvania criminal courts from exercising their prerogative in administering the state criminal justice system.[2/] By comparison, the cases cited by petitioner both involved

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2/ The Third Circuit is appropriately sensitive to the principles of federalism and comity in bankruptcy matters which implicate the proper functioning of state criminal courts. See Matter of Davis, 691 F.2d 176 (3d Cir. 1982).

debtors seeking injunctions against state court proceedings.

In both McDonald v. Burrows, 731 F.2d 294 (5th Cir. 1984), cert. den. 467 U.S. 852 (1984) and Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982), the courts ruled that debtors were not entitled to an injunction of a state prosecution where the irreparable harm was speculative. The debtors had not been convicted, no restitution had been imposed and the bankruptcy court had not ruled on dischargeability. Moreover, as the Eleventh Circuit pointed out in Barnette, the debts at issue were not dischargeable under 11 U.S.C. §523(a)(2)(A). Barnette, 673 F.2d at 1252. Thus, these cases bear no similarity to the case at bar, where the state prosecution is long over and only declaratory relief under the Bankruptcy Code is sought.

II. The Court Of Appeals Correctly Ascertained The Intent Of Congress To Allow Debtors To Provide For Restitution Obligations In Chapter 13 Bankruptcy Cases

1. Where the terms of a statute are unambiguous, only the "most extraordinary showing of contrary intentions" from the legislative history would justify limiting the statute's plain language. Garcia v. United States, 469 U.S. 70, 75 (1984). Just last term, the Court declined to misread a statute "in order to reach a sympathetic result," pointing out that "Congress chose the language that requires us to decide as we do, and Congress is free to change it." Mansell v. Mansell, 109 S.Ct. 2023, 2031 (1989).

Petitioner would have this Court graft a judicial exception on to the Chapter 13 discharge provision, 11 U.S.C. §1328(a), for restitution

obligations. However, the Code clearly provides for the discharge of such obligations.

The Court of Appeals in this case followed the plain language of the Bankruptcy Code and correctly held that a restitution order is a debt that is dischargeable in a Chapter 13 bankruptcy. Contrary to the suggestion in the Commonwealth's petition, almost every court that has considered this question has agreed with the Court of Appeals.[3/]

The Court of Appeals correctly followed Congress' expressed intent that the term "claim", defined in the Code as a "right to payment," 11 U.S.C. §101(4)(A), is to be given the "broadest

3/ See n.1, supra.

possible definition."[4/] That this language requires restitution to be classified as a debt is a conclusion recognized even by courts holding restitution nondischargeable.[5/]

Contrary to the Commonwealth's statement at p.31 of its petition, the Court of Appeals did not agree with the Commonwealth's argument that the victim does not possess a right to payment. The Court of Appeals clearly held that there is a right to payment,

4/ H. Rep. No. 595, 99th Cong., 2d Sess. 309, reprinted in U.S. Code Cong. & Admin. News 5787, at 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5807-08.

5/ In re Taite, 76 B.R. 764 (Bankr. C.D.Cal. 1987); In re Newton, 15 B.R. 708 (Bankr. N.D.Ga. 1981). See also, Kelly v. Robinson, 479 U.S. 36, at 56-57 (1986) (Marshall, J. dissenting).

irrespective of who may enforce that right. 871 F.2d at 425; Pet. App. 23a.

The Commonwealth argues that the Court of Appeals misconstrued the Pennsylvania restitution statute. In making this argument, the Commonwealth fails to consider how the restitution statute operates in practice. While the statute, 18 Pa.C.S.A. §1106, does not provide the victim with direct authority to enforce the restitution order, it requires that restitution be collected by the probation authorities and be forwarded directly to the victim. 18 Pa.C.S.A. §1106(e). It also preserves the victim's civil remedies. 18 Pa.C.S.A. §1106(g). Since the statute quite obviously contemplates that the victim be compensated for his loss, how can it be said that the victim has no right to payment? That the funds are

collected for the victim by a governmental unit does not alter the fact that there is an obligation to pay the victim. It is that obligation, as the Court of Appeals properly held, which gives rise to a "right to payment" under the Code.

Moreover, the gravamen of the Commonwealth's petition is that the Court of Appeals misconstrued Pennsylvania's restitution statute. Therefore, this petition raises an issue of local concern which does not merit this Court's review.

2. Having held that restitution is a debt, the Court of Appeals then proceeded to the inescapable conclusion that the debt is dischargeable. Congress expressly excepted governmental penalties from discharge in Chapter 7, 11 U.S.C. §523(a)(7), and just as

clearly did not do so in Chapter 13. 11 U.S.C. §1328(a).

> [B]ecause Congress has effectuated its policy of preventing the Code from becoming a "haven for criminals" by adopting appropriately restrictive language for specific provisions of the Code, ... its silence on this subject with respect to other provisions is equally telling and may not be discounted.

871 F.2d at 427-428; Pet. App. 35a-36a.

There are a number of reasons for Congress' different treatment of dischargeability in the two chapters. Whereas a Chapter 7 bankruptcy is a liquidation where creditors receive proceeds from the sale of any non-exempt assets, Congress designed Chapter 13 as a way for a debtor to financially rehabilitate himself and pay his creditors to the extent he can afford. The Chapter 13 debtor is required to

propose a plan in good faith[6/] whereby he submits all his disposable income for at least three years[7/] for the payment of allowed claims. Creditors are also entitled to receive at least as much as they would get in a Chapter 7 bankruptcy, i.e., the present value of all of the debtor's non-exempt property.[8/] 11 U.S.C. §1325(a)(4).

Moreover, the Code expresses a reasonable legislative policy providing an incentive to a debtor willing to submit his income over a lengthy period of time. That incentive is the entitlement to a discharge of debts that

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6/ 11 U.S.C. §1325(a)(3).

7/ 11 U.S.C. §1325(b)(1)(B).

8/ The Code specifically provides that governmental penalties are eligible for distributions from the debtor's estate. 11 U.S.C. §726(a)(4).

are not dischargeable in Chapter 7. In re Rimgale, 669 F.2d 426, 428 (7th Cir. 1982); 5 COLLIER ON BANKRUPTCY, ¶1328.01 at 1328-4 (15th ed. 1988).

Thus, the Court of Appeals rightly held that restitution is dischargeable in Chapter 13. By comparison, in Chapter 7 liquidations, as recognized by this Court in Kelly v. Robinson, 479 U.S. 36 (1986), courts historically refused to allow a discharge to affect the judgment of a state criminal court. The Court's "serious doubts" whether Congress intended to make criminal penalties debts, Kelly, 479 U.S. at 50, were based on a tradition of caselaw applicable only to liquidation cases.

In sum, Congress expressly codified the long-standing judicial exception to discharge of criminal penalties in

Chapter 7 only, at 11 U.S.C. §523(a)(7). Just as clearly, Congress did not include that exception in Chapter 13, 11 U.S.C. §1328(a). If that is a defect in the legislation, it is up to Congress, not the courts, to effect a cure. Mansell v. Mansell, 109 S.Ct. at 2031.

3. Not only was the holding of the Court of Appeals mandated by the plain language of the Code, it also has only a minimal effect on a state's interest in enforcing criminal statutes.

Nondischargeability is assured in Chapter 7 bankruptcies. In Chapter 13 cases, a restitution debt will be paid under the plan equally with other debts.

Moreover, contrary to petitioner's concern, the holding of the Court of Appeals will not require bankruptcy courts to reexamine factual questions or

to interpret state law previously decided in state criminal proceedings.[9/]

Finally, restitution is only one of an entire array of sentencing alternatives available to a court. Restitution in Pennsylvania is required under the welfare fraud law, 62 P.S. §481(c). As such, it is not a considered decision of the sentencing court, but automatically imposed, serving almost as a state law mandated collection device. However, there is no limit on other sentences that any court might devise in order to achieve society's dual interest in penalizing

9/ This Court's similar concern in Kelly, 479 U.S. at 48, was presumably based on a different dischargeability provision, 11 U.S.C. §523(a)(6), where different courts' standards of what is "willful and malicious" might complicate principles of issue preclusion.

and rehabilitating the offenders. Where the offender is indigent, for example, as is usually the case with recipients of excess public assistance, a court could order probation conditional on community service or a work program that benefits the victim. See Galaway, Toward the Rational Development of Restitution, in RESTITUTION IN CRIMINAL JUSTICE, 77, 80-81 (Hudson & Galaway, eds. 1977).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE, *ET AL.*,
Petitioners,

v.

EDWARD J. and DEBORA A. DAVENPORT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF
THE COMMONWEALTH OF VIRGINIA
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Commonwealth of Virginia views the decision of the Third Circuit Court of Appeals in this case as a serious threat to the criminal justice system. Not only did the Court of Appeals wrongly decide that criminal restitution is a dischargeable "debt" in a Chapter 13 bankruptcy (thereby turning on its head this Court's decision in *Kelly v. Robinson*, 479 U.S. 36 (1986)), but the language of the decision is so broad as to include even criminal fines as dischargeable "debts". With such a holding, the federal bankruptcy courts will be in a position to interfere with state court imposed criminal sanctions to an even greater degree than was considered inappropriate in *Kelly* (479 U.S. at 47-49). If both criminal restitution orders and criminal fines are dischargeable in a Chapter 13 bankruptcy, incarceration may become the only effective measure available to criminal courts to punish and rehabilitate convicted offenders.

Accordingly, the Commonwealth of Virginia supports the Commonwealth of Pennsylvania in urging this Court to review the Third Circuit's decision, and asks the Court to consider the far-reaching implications of that decision as to criminal fines as one more reason (in addition to the reasons cited by Pennsylvania in its petition and by Connecticut in its amicus brief) to grant review.

SUMMARY OF ARGUMENT

The essence of amicus' argument was succinctly stated by the District Court which was reversed by the Third Circuit in this case. In *Davenport v. Com. of Pa., Dept. of Public Welfare*, 89 B.R. 428, 430 (E.D. Pa. 1988), Judge Shapiro stated:

> It is essential that state courts are able to impose penal sanctions other than incarceration without fear that a federal court will render this punishment nugatory after the fact.

Apparently, the Third Circuit does not consider this ability to be essential. Amicus submits that it is, indeed, essential, and that this Court has gone to great lengths in the *Kelly v. Robinson* decision to explain why it is essential. Accordingly, amicus urges this Court to review the Third Circuit's decision reversing Judge Shapiro, because that decision leaves incarceration as the only available criminal sanction which cannot be defeated by the bankruptcy courts.

ARGUMENT

In holding that criminal restitution orders are dischargeable in a Chapter 13 bankruptcy, the Third Circuit has used language indicating that all criminal penalties, including fines, penalties and forfeitures, are dischargeable "debts" under Chapter 13. For example, the court states:

> As the Court determined in *Kelly*, criminal restitution obligations fall within the category of a fine, penalty or forfeiture" under §523(a)(7). Although Congress did incorporate into Chapter 13 one of the ten exceptions under section 523(a), it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution, or any facsimile thereof . . . . Congress' considered decision to adopt only one of the section 523(a) exceptions to discharge for Chapter 13 and its concomitant failure to adopt the *criminal penalties provision* or any similar exception compels the conclusion that *such penalties, including criminal restitution*, are dischargeable under Chapter 13. *Cf. Kelly*, 479 U.S. at 50, 107 S.Ct. at 361. (871 F.2d at 428) (Emphasis added.)

Later on the same page, the court states:

> Here, Congress has codified the *criminal penalties* exception to discharge and has chosen not to apply the exception to Chapter 13 bankruptcy. (Emphasis added.)

and on page 428, the court states:

> We thus decline to second-guess Congress and refuse to insinuate language into its legislation excepting *criminal penalties* from the definitions of "claim" or "debt." (Emphasis added.)

In addition, in discussing Justice Mar .all's dissent in *Kelly v. Robinson*, the court says:

> Noting that only debts are subject to discharge under the Code, Justice Marshall reasoned that if restitution orders *and other criminal penalties* were not debts, there would be no need to except them from discharge under Chapter 7. *Kelly*, 479 U.S. at 58, 107 S. Ct. at 365. We find this reasoning persuasive and conclude that Congress must have recognized that such obligations were debts within the

meaning of the Code. *See Kelly*, 479 U.S. at 58, 107 S. Ct. at 365 (dissent); *In re Heincy*, 78 B.R. at 248; *In re Cullens*, 77 B.R. at 828.

The Court's analysis in *Kelly* also provides an apt response to the argument that criminal restitution is not a debt when such restitution is ordered primarily to rehabilitate the offender rather than to compensate the victim. As the Court held, section 523(a)(7) excepts from discharge criminal restitution precisely because that penalty is imposed primarily for punitive and rehabilitative purposes, and only incidentally for purposes of compensating the victim. The statutory exception to discharge logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such penalties are debts despite the underlying motivations of punishment and rehabilitation. Therefore, we hold that restitution obligations constitute debts even when the state's primary objectives in imposing such obligations are to rehabilitate and to punish the offender, rather than to compensate the victim. (871 F.2d at 426-427) (Emphasis added.)

The Third Circuit cites Justice Marshall's dissent in the *Kelly* case, and *In re Heincy*, 78 B.R. 246 (9th Cir. BAP 1987) and *In re Cullens*, 77 B.R. 825 (Bkrtcy. D. Colo. 1987), in support of its holding that criminal penalties, in addition to restitution, are dischargeable debts in a Chapter 13 bankruptcy, even though none of the cases dealt with criminal penalties other than restitution. In addition, the Bankruptcy Court decision underlying the Third Circuit's decision contains language stating that criminal fines are dischargeable, even though criminal fines were not the issue before the court. In *In re Davenport*, 83 B.R. 309, 316 (Bkrtcy. E.D. Pa. 1988), *rev'd sub nom. Davenport v. Com. of Pa., Dept. of Public Welfare*, 89 B.R. 428 (E.D. Pa. 1988), the court makes the startling statement that "there is no dispute that § 1328(a) discharges criminal fines and penalties," and, on page 315, that "fines, penalties and forfeitures, made payable to governmental units, are made dischargeable in Chapter 13." The court cites nothing in support of either statement, however.

Amicus submits that there is, in fact, a dispute about whether criminal fines and penalties are dischargeable in a Chapter 13 bankruptcy. Most courts which have had the precise issue before them have held that criminal fines are *not* dischargeable debts under Chapter 13. *See, In Re Norman*, 95 B.R. 771 (Bkrtcy. D. Colo. 1989); *In Re Ferris*, 93 B.R. 729 (Bkrtcy. D. Colo. 1988); *In Re Kohr*, 82 B.R. 706 (Bkrtcy.

M.D. Pa. 1988); *In Re Jacobson*, 35 B.R. 40 (Bkrtcy. D. Ariz. 1983). Amicus has found only two decisions holding that a criminal fine is a dischargeable debt under Chapter 13, where that issue was actually before the court. Both of those cases, *In Re Gilliam*, 67 B.R. 83 (Bkrtcy. M.D. Tenn. 1986) and *In Re Young*, 10 B.R. 17 (Bkrtcy. S.D. Cal. 1980), were decided prior to *Kelly v. Robinson*, in which this Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." 479 U.S. at 50.

The Commonwealth of Pennsylvania has argued in its Petition that the Third Circuit's decision as to restitution orders hampers the flexibility of state (and, presumably, federal) criminal courts by greatly reducing the effectiveness of restitution as an alternative criminal sanction. The *amicus curiae* brief filed by the State of Connecticut echoes that argument. The Commonwealth of Virginia does not wish to repeat those arguments, but submits that the impact of the Third Circuit's decision on the criminal justice system is even greater than the Pennsylvania and Connecticut briefs have suggested, because the decision will be read as applying not only to criminal restitution orders but to criminal fines as well. Pennsylvania and Connecticut have limited their briefs to the issue of restitution because that was the actual issue before the Third Circuit. It appears, however, that under the Third Circuit's reasoning, incarceration alone would be considered a nondischargeable penalty in a Chapter 13 bankruptcy. Amicus believes it is quite apparent that the arguments made by Pennsylvania and Connecticut regarding the need for this Court to review this case apply even more strongly when it is understood that the decision makes dischargeable not only restitution orders but criminal fines and other penalties as well.

Restitution is a valuable tool in meting out an appropriate punishment to criminal offenders. A criminal fine is a valuable tool as well. The Third Circuit's decision hampers the usefulness of both tools. It is quite likely that criminal offenders will file for bankruptcy if they can thereby discharge criminal fines and restitution orders. The impact on the criminal justice system, and the public confidence in that system, is predictible if criminal penalties are so easily avoided. Criminal courts will be forced to consider incarceration as the only effective penalty, even for lesser offenses, but overcrowded prisons will prevent increased use of incarceration. The public will lose confidence in the ability of the criminal justice system to effectively punish criminals if incarceration cannot be imposed as a practical matter, and criminal fines and restitution can be so easily discharged.[1] Those members of the public who might be tempted to commit

[1] There may be some question about the ease of discharging criminal fines in a Chapter 13 case. In *In re Gilliam* and *In re Young*, the two cases which held such fines

(Continued on next page.)

crimes such as the welfare fraud scheme involved in this case may be encouraged to proceed, since the perception will be that they have nothing to lose if criminal penalties can be avoided in bankruptcy.

CONCLUSION

All of the arguments made in the Pennsylvania and Connecticut briefs concerning the impact of this decision on the criminal justice system because it makes restitution orders dischargeable, apply equally to the court's holding that criminal fines and other penalties are dischargeable. The fact that the decision makes all penalties other than incarceration dischargeable means that the impact of the case, and the need for review by this Court, is greater than even Pennsylvania and Connecticut have argued.

Amicus urges this Court to grant the petition for writ of certiorari.

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[1] *(Continued from previous page.)* dischargeable under Chapter 13, the debtors' plans provided for 100% payment of the fines. That is not the usual case, however. As Judge Wood stated in *In re Kohr*: "The majority of Chapter 13 cases are filed to save the home. Most provide very small payments to unsecured creditors. I have approved plans with no payments going to unsecured creditors. The strong principals enunciated in the *Kelly* case are totally inconsistent with the discharge of criminal penalties in a Chapter 13 case." 82 B.R. at 712.

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IN THE
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v.

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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INTEREST OF AMICI CURIAE

Amici curiae are States, each of which views criminal restitution as an important sentencing option in its criminal justice system. The Third Circuit's decision, which construed restitution as a dischargeable debt in Chapter 13 bankruptcy proceedings, threatens to deprive States of this option in many cases. With the option of seeking restitution significantly compromised, States will have greater difficulties in devising punishments to fit the crime and in meaningfully dispensing criminal justice. The amici States accordingly support the Commonwealth of Pennsylvania in urging this Court to review the Third Circuit's decision.

By allowing convicted offenders to discharge restitution orders in Chapter 13 bankruptcy proceedings, the Third Circuit's decision curtails the effectiveness of restitution as a measured and narrowly-tailored punishment in particular criminal cases. The decision will likely result in offenders receiving sentences disproportionate to their crimes, crime victims having to go without the benefits of compensation, and the public losing confidence in its criminal justice system.

The Third Circuit's decision also stands in conflict with this Court's decision in Kelly v. Robinson, 479 U.S. 36 (1986). It would be a most surprising result if Congress recognized the historical exemption of criminal judgments when it enacted the Bankruptcy

Code, as the Kelly Court stated, and yet in the same Code made provision for the discharge of criminal restitution in Chapter 13 proceedings.

For these reasons, this Court should grant certiorari.

ARGUMENT

Amici had thought that this Court in Kelly v. Robinson, 479 U.S. 36 (1986), had laid to rest the notion that convicted criminals could escape punishment by filing bankruptcy petitions. Seven Justices joined in expressing "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of [11 U.S.C.] § 101(4)" (the Bankruptcy Code section defining "debt"). Id. at 43-49. The majority went on to hold that criminal restitution fell within the § 523(a)(7) exception to discharge for fines, penalties, and forfeitures, which is primarily applicable to Chapter 7 liquidation and Chapter 11 business reorganization proceedings. Id. at 50-53.

Justice Marshall noted in dissent, however, that the Court's opinion left open the possibility that criminal restitution would become dischargeable under the wage earner reorganization provisions of Chapter 13, which contain no applicable exception to discharge. Id. at 59 n.6 (Marshall, J., dissenting). The Third Circuit's decision, along with that of a number of district and bankruptcy courts, see Petition for Certiorari, has now made that possibility a reality. This Court should grant certiorari to review these decisions because of the importance of the issue to the administration of criminal justice in the States and because these decisions conflict with this Court's dicta in Kelly.

1. Restitution is a valuable tool in meting out punishment that fits the crime. Restitution is particularly appropriate in crimes such as welfare, consumer, or business fraud, in which the offender has improperly taken the property of others. See, e.g., Kelly v. Robinson, 479 U.S. at 38-39 (welfare fraud). Ordering the offender to make restitution to the victim forces him "to confront, in concrete terms, the harm his actions have caused." Id. at 49 n.10. Like a fine, restitution punishes without incarceration but, unlike a fine, restitution compensates the victim. Restitution thus provides the middle ground in a State's sentencing arsenal.[1]

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[1]In many cases, of course, it will be appropriate to combine a restitution order with a fine, prison term, or other sentencing alternative.

The possibility that an offender sentenced to make restitution will file for bankruptcy is not insignificant. Many, particularly those convicted of welfare fraud, face financial difficulties aside from the obligation to make restitution. The temptation to satisfy the restitution obligation in a manner similar to that used for ordinary civil debts, now enhanced by the Third Circuit's decision, is surely hard to resist.

The Third Circuit's ruling thus threatens to create a form of revolving door system of justice in which an offender receives a restitution order in State court and then discharges it in federal bankruptcy court. This result will not advance public confidence in our criminal justice system, already lowered by the perception that offenders

escape punishment for various other reasons unrelated to guilt or innocence. The natural reaction, moreover, to the compromising of restitution orders by bankruptcy courts is for States to refrain from seeking and imposing such orders. As a consequence, offenders will face a greater likelihood of incarceration, burdens on our overcrowded prison system will increase, and crime victims will lose the compensation that restitution provides. The States obviously desire to avoid this scenario.

2. The Third Circuit's decision stands in conflict with this Court's opinion in Kelly, which Connecticut and other amici States sought in this Court less than three years ago. The extensive discussion in Kelly of the proposition that criminal

restitution does not constitute a debt, although arguably unnecessary to the Court's holding, should not be lightly tossed aside. This point is especially true because the Court focused on the intent of the 1978 Congress, something that ordinarily does not change over time.

The Kelly Court relied, first, on the fact that "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders," and that Congress did not express any intent to alter this traditional approach. 479 U.S. at 44, 47. And the Court also felt it fair to presume that Congress acted in accord with the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal

proceedings." Id. at 47. The Court expressed the concern that treatment of restitution as a dischargeable debt "could lead to federal remission of judgments imposed by state criminal judges." Id. at 49.

These concerns are not limited to Chapter 7 proceedings. Logically they extend to the entire Bankruptcy Code, including Chapter 13. Congress could not have recognized the historical and theoretical basis for exempting criminal judgments from the bankruptcy process and at the same time deemed criminal restitution to constitute a dischargeable debt under Chapter 13. The Third Circuit's decision thus conflicts with this Court's opinion in Kelly.

CONCLUSION

The petition for a writ of certiorari should be granted.

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v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX

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To The United States Court Of Appeals
For The Third Circuit

(E.D. BANKRUPTCY COURT No. 87-02395F)

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
1987		
5/15	1	Petition, Certification of Chapters and Statement of Intent.
5/15	2	Matrix
5/15	3	Application to pay filing fees in installments.
5/15	4	Order Entered to pay filing fees in installments as follows: $22.50 on or before June 15, 1987 $22.50 on or before July 15, 1987 $22.50 on or before August 17, 1987 $22.50 on or before September 15, 1987 (3 notices mailed)
5/15	5	Local Rule 1017.2, Edward Sparkman.
5/15	6	Certificate of mailing Procedural Order #1. (1 notice mailed)
5/29	7	Chapter 13 Statement, Debtors' Certification in lieu of Supplemental Statement, Chapter 13 Summary Sheet, Plan.

Date	No.	Proceedings
6/1	8	Praecipe to substitute the Amended Matrix List.
6/18	9	Notice of Creditors Meeting scheduled for July 13, 1987 at 2:00 p.m and Confirmation for October 20, 1987.
7/30	10	Notice of Hearing to consider dismissal for failure to pay filing fees scheduled for September 15, 1987 at 10:00
8/12		Complaint of Debtor v. Commonwealth of Pa., et al. to Determine Dischargeability of a Debt
10/20		Confirmation Hearing Held and Concluded.
10/20	11	Order entered approving trustee's report.
10/20	12	Order entered confirming the Plan.
10/22	13	Certificate of Readiness for Confirmation of Chapter 13 Plan.

Date	No.	Proceedings
1988		
5/2	14	Transcript of hearing dated October 26, 1987.
6/7	15	Praecipe to enter discharge order by David Searles, Esq.
6/9	16	Certificate of Mailing: Notice of Discharge
7/7	17	Certification of no objection to a discharge.
7/12	(15)	Order entered 7/8/88 discharging case. Notices mailed with info sheet.
10/19	18	Final report & account filed by trustee on 9/26/88
10/19		Closing report prepared

(E.D. BANKRUPTCY COURT No. 87-0737)

RELEVANT DOCKET ENTRIES

Date	No.	Proceeding
1987		
8/12	1	Complaint filed.
8/14	2	Summons issued. Answer date: 9/15/87. Trial date: 9/28/87.
9/21	3	Defendants Answer to Complaint.

Date	No.	Proceeding
9/23	4	Certification that all counsel have agreed to submit this matter on stipulation of facts and briefs. Counsel anticipate filing said stipulation by 10/30/87. The parties hope to file opening briefs no later than 11/30/87 and reply briefs no later than 12/15/87.
9/23	5	Entry of Appearance by John D. Blumenthal, Esq. on behalf of Court of CommonPleas of Bucks County and Adult Probation and Parole Dept. Answer to Complaint.
9/28		Complaint adjourned to 10/26/87.
10/26		Hearing re: HELD UNDER ADVISEMENT.
11/23	7	Plaintiff's Memorandum of Law in reply to letter of defendant Probation Dept.
12/1	8	Notice of status hearing to be held on 12/21/87 at 10:00 a.m.
12/21		Hearing re: Debtors Counsel to file certification of debtor intention whetheror not to proceed within 20 days.

Date	No.	Proceeding
1988		
1/5	9	Certification of debtor stating that they want to maintain action against the defendants.
3/8	10	OPINION AND ORDER entered that the obligation of debtors to make payments to Bucks County Adult Probation and Parole Dept. for the purpose of restitution to the Comm. of Pa. Dept. of Welfare represents a dischargeable unsecured debt. Any payments made by plaintiffs and received by defendants shall be turned over to the standing Ch. 13 Trustee.
3/18	11	Notice of Appeal of Opinion and order dated 3/8/88.
3/23	12	NOTICE OF APPEAL from the Order of 3/8/88 filed by Court of Common Pleas ofBucks County.
3/24	13	Defendants Designation of Contents of Record and Statement of Issued to be presented on appeal. (Comm. of Pa. Dept. of Welfare)
3/25	14	Defendants Adult Probation's Designation of Contents of Record and Statement of Issues to be presented.

(E.D. OF PENNSYLVANIA No. 88-3177)

RELEVANT DOCKET ENTRIES

Date	Proceedings
04/14	Certificate of appeal from order of Bankruptcy Judge entered on 3/08/88, filed.
07/29	Memorandum & Order that the Opinion of the Bankruptcy Court dtd. 3/8/88 is reversed for the reasons set forth in the memorandum attached, filed.
08/12	Appellants' notice of appeal, filed (USCA 88-1635)
08/25	Record complete for purposes of appeal - transcript not needed.

UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

In re EDWARD J. DAVENPORT, SR., a/k/a EDWARD DAVENPORT AND DEBORA A. DAVENPORT Debtor (set forth here all names including trade namesused by Debtor within last 6 years 166-42-6977 Social Security No. 162-44-6822 and Debtor's Employer Tax Identification No._____	Case No. 87-02395

CHAPTER 13
VOLUNTARY JOINT PETITION

1. Petitioners' mailing address, including county, is 8017 Frankford Avenue, Philadelphia, PA 19136 .

2. Petitioners have resided [or have had their domicile or have had their principal place of business or have had their principal assets] within this district for the preceding 180 days [or for a longer portion of the preceding 180 days than in any other district].

3. Petitioners are qualified to file this petition and are entitled to the benefits of title 11, United States Code as voluntary debtors.

4. A copy of petitioners' proposed plan, dated _____, is attached [or Petitioners intend to file a plan pursuant to chapter 13 of title 11, United States Code].

6. Petitioners are aware that they may proceed under chapter 7 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 13 of such title.

7. A declaration or an affidavit in the form of Exhibit B is attached to and made a part of this petition.

Signed: /s/ David A. Searles
Attorney for Petitioner

Address: DAVID A. SEARLES, ESQUIRE
COMMUNITY LEGAL SERVICES, INC.
3156 KENSINGTON AVENUE
PHILADELPHIA, PA 19134-2483

[Petitioners sign if not represented by attorney.]

_____,
Petitioners

We, EDWARD J. DAVENPORT and DEBORA A. DAVENPORT, the petitioners named in the foregoing petition, declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4/13/87

Signature: /s/ Edward J. Davenport
Petitioner

Signature: /s/ Debora A. Davenport
Petitioner

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:	
EDWARD J. DAVENPORT, SR., a/k/a EDWARD DAVENPORT & DEBORA A. DAVENPORT	Case No. _____
Debtors (set forth here all names including trade named used by Debtors within last 6 years)	
Social Security Nos.	
166-42-6977	
162-44-6822	
and Debtors' Employer Tax Identification Nos.	
_____	
_____	

_____
FOR COURT USE ONLY

_____
Date Petition Filed

_____
Case Number

_____
Bankruptcy Judge

I, David A. Searles, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioners that they may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

Executed on 5/12/87

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:
EDWARD & DEBORA DAVENPORT, : CHAPTER 13

Debtors. : BKY. NO. 87-

CERTIFICATION AS TO PRIOR PETITION

I hereby certify that I am informed by the debtors that a Chapter 7 petition was filed in this district in April, 1979. I am not aware of the number of the case or the outcome.

_____

_____

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:
EDWARD & DEBORA DAVENPORT, : CHAPTER 13

Debtors. : BKY. NO. 87-

STATEMENT UNDER BANKRUPTCY RULE 2016(2)

Pursuant to Bankruptcy Rule 2016(b), the undersigned, attorney for the debtors herein, states that he has received no compensation for services rendered or to be rendered. The debtors are being provided legal services at no charge, and it has been agreed that there will be no compensation for services rendered paid to the undersigned or any other entity.

DATED: 5/12/87

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:
EDWARD & DEBORA DAVENPORT, : CHAPTER 13

Debtors. : BKY. NO. 87-

DEBTORS' STATEMENT OF INTENT
UNDER U.S.C. § 521(2)

The debtors intend to retain all property of the estate securing consumer debts

The debtors have claimed all property of the estate securing consumer debts as exempt

The debtors do not intend to redeem any property or reaffirm any debt

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:

EDWARD J. DAVENPORT, SR., a/k/a EDWARD DAVENPORT & DEBORA DAVENPORT,	:	CHAPTER 13
	:	BKY. NO. 87-02395F
Debtors	:	

CHAPTER 13 SUMMARY SHEET

I. LIABILITIES

A.	Total amount of all scheduled priority debts	$ 57.00
B.	Total amount of all scheduled secured debts (include the principal balance of each debt	$ 0.00
C.	Total amount of all scheduled unsecured debts	$12,751.14
D.	Total of A, B, &C (all scheduled debts)	$12,808.14
E.	Total number of creditors	#12

II. ASSETS

A.	Value of all real property	$ 300.00
B.	Value of all personal property	$ 9,400.00

C.	Value of all property not included in II. A & B above	$ 0.00
D.	Value of all property (A+B+C)	$ 9,700.00

III. BUDGET

A.	Total monthly income of debtors' household	$ 1,064.00
B.	Total monthly expenses of debtors' household	$ 1,037.00
C.	Amount to be paid to trustee	$ 10.00

IV PLAN

A.	Amount of each payment under plan	$ 10.00
B.	Furequency of payments (Specify)	$ monthly
C.	Total number of payments to be made	#12
D.	Length of Chapter 13 plan (specify)	12 months
E.	Total amount to be paid under plan	$ 120.00
F.	Amount of claim to be paid under plan excluding trustee's commission. Secured $0.00; Priority $_____ Unsecured $108.00; Attorney's Fee	$ 0.00

TOTAL:
$ 108.00

G. Amount of trustee's commission $ 12.00

H. Amount of attorney's fees: $ 0.00

- paid as of date petition filed $ 0.00

- to be paid under plan $ 0.00

- unpaid as of date petition filed $ 0.00

Social Security Number of Debtor No. 1:166-42-6977

Social Security Number of Debtor No. 2:162-44-6822

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors

COMMUNITY LEGAL SERVICE, INC.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

support? (Give name, age, and relationship to you.)
Husband (or Debtor)

Wife

b. List all other dependents, other than present spouse, not listed in a, above. (Give name, age and relationship to you.)
Husband (or Debtor)

Wife

b.

H/Linda Marie Davenport, 12, daughter
Edward John Davenport, Jr., 11, son
W/ Same as above

4. Budget.

a. Give your estimated average future monthly income, if unmarried, otherwise for each spouse whether single or joint petition is filed, unless spouses are separated and a single petition is filed.

4.
a.

(1) Husband's (or Debtor's) monthly take home pay	(1). 710. Social Security
(2) Wife's monthly take home pay	(2). 0.00
(3) Other monthly income (specify)	(3). 354. to family in social security
Total	$1064.00

b. Give estimated average future monthly expenses of family (not including debts to be paid under plan), consisting of:

(1) Rent or home mortgage payment (include lot rental for trailer)	$48.00	$400.00
(2) Utilities (electricity, heat, Water $22.00, Telephone $25.00)		$115.00
(3) Food		$400.00
(4) Clothing		$ 40.00
(5) Laundry and cleaning		$ 15.00
(6) Newspapers, periodicals, and books (including school books)		$ 12.00
(7) Medical and drug expenses		
(8) Insurance (not deducted from wages)		
(a) Auto		
(b) Other		
(9) Transportation (not including auto payments to be paid under plan)		$ 30.00
(10) Recreation		$ 25.00
(11) Dues, union, professional, social or otherwise (not deducted from wages)		
(12) Taxes (not deducted from wages)		
(13) Alimony, maintenance, or support payments		
(14) Other payments for support of dependents not living at home		
(15) Religious and other charitable contributions		
(16) Other (specify)		
Total		$ 1037.00

c. Excess of estimated future monthly income (last line of Item 4a, above) over estimated future expenses (last line of Item 4b, above)

c. $27.00

d. Total amount to be paid each month under plan

d. $10.00

10a 17a

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c. Unsecured Debts. List all other debts, liquidated and unliquidated, including taxes, attorneys' fees, and tort claims

Creditor's name, account number and complete mailing address including zip code	Consideration or basis for debt	Amount claimed by creditor	If disputed, amount admitted by debtor	Husband or wife solely liable, or jointly liable
ɔt. of Public Welfare fice of FAIR). Box 8016 rrisburg, PA 17105-8016 tn: Mary B. Seiverling, Esquire	public assistance overpayment	$6883.80	$0.00	Jointly liable
iladelphia Electric ɔany)1 Market Street iladelphia, PA 19103	electric service	$ 950.00		" "
zareth Radiology Assoc. 3 Lakeside Drive rsham, PA 19044	medical services	$ 379.00		Husband solely liable
derick C. Cannatella, D.O.). Box J ion Street Station lmington, DE 19805	medical services	$ 150.00		" "
restone Consumer Services). Box 81315 AMF veland, OH 44181	charge card	$ 449.76		" "
eat American Financial). Box 64537 ltimore, MD 21264	spa membership	$ 748.17		Jointly liable
rawbridge & Clothier). Box 1708 iladelphia, PA 19105	charge card	$ 293.82		Wife solely liable
lon Bank (DE), N.A.). Box 8906 lmington, DE 19899	visa card	$1300.00		" " "
ntgomery Ward). Box 2396 ltimore, MD 21203	charge card	$ 196.59		" " "
nklin Readers Service). Box 8068-5115 iladelphia, PA 19177	magazine subscription	$ 500.00		Husband solely liable

CONTINUED ON NEXT PAGE ...

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ears, Roebuck & Co. O. Box 6970 iladelphia, PA 19132	charge card	$ 900.00	Wife solely liable
erk of Court cks County Courthouse ylestown, PA 18901	court costs	$ 217.00	Both liable

TOTAL UNSECURED DEBTS: $ 12,968.14

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:

EDWARD J. DAVENPORT, SR., a/k/a EDWARD DAVENPORT & DEBORA DAVENPORT,	:	CHAPTER 13
	:	BKY. NO. 87-02395F
Debtors	:	

CHAPTER 13 PLAN OF THE DEBTORS

1. If the instant estate were liquidated under chapter 7 of the Bankruptcy Code, the allowed unsecured claimants would be paid in full.

2. Under this plan the allowed secured claimants will receive not less than that amount.

3. The debtors shall submit to the supervision and control of the trustee the following sum of $10.00 per month for 12 months.

4. The various claims of the debtors' creditors shall be classified as follows:

a. Class: 1: Claims filed and allowed which are entitled to priority under 11 U.S.C. § 507. The administrative expenses are the only priority claims contemplated by this plan. Any creditor entitled to priority under section 507 of the Bankruptcy Code contrary to the provisions of this plan shall be deemed to have agreed to waive any such priority, unless such entity objects to the plan.

b. Class 2: Claims filed and allowed which are secured by a lien which is not avoidable or void pursuant to the various provisions of the Bankruptcy Code. It is anticipated that there are no Class 2 claims that will be filed in this case.

c. Class 3: All other claims.

5. The payments received by the trustee from the debtors pursuant to this plan shall be distributed as follows:

b. Class 2 claims: After the application of the appropriate amount each month to the Class 1 claims, the entire amount of the monthly payment remaining in the hands of the trustee shall be distributed, pro rata, to the holders of the Class 2 claims until each such claimant shall have received 100% of the amount allowed on each such claim.

c. Class 3 claims: After the application of the appropriate amount each month to the Class 1 and Class 2 claims, the entire amount of the monthly payment remaining in the hands of the trustee shall be distributed, pro rata, to the holders of the Class 3 claims.

6. By failing to object to this plan, or any modification thereof, all creditors holding claims agree not to make any effort to collect their claims from any cosigner that may exist, so long as this case remains pending.

7. Confirmation of this plan shall constitute a finding that the plan constitutes the debtors' best effort under all the circumstances to pay their creditors, within the meaning of 11 U.S.C. § 727(a)(9).

8. Confirmation of this plan shall constitute a finding in accordance with 11 U.S.C. § 1322 that there is cause for extending the plan beyond three years. Confirmation shall also constitute approval of such extension. Such extension is essential to the success of the plan. Without it the plan would fail and claims would be paid in full.

9. The current defaults by the debtors on the Class 2 claims are waived and shall be cured by the completing of this plan.

10. The title to the property of the estate shall revest the debtors upon confirmation of this plan, and the debtors shall have sole right to use the possession thereof.

11. Confirmation of this plan shall constitute a finding and order that due to the debtor' low income, the trustee's fee should not exceed 10% of each monthly payment, even if that amount is less than $5.00 per month.

12. Any other money or property acquired by either the trustee or the debtors, or refunded from the trustee's percentage fees, while this case is pending shall be deemed exempt property of the debtors, if exemptable,

and shall be forthwith delivered to the debtors.

13. If the debtors default after filing of the petition, on any payment to a utility entitled to adequate assurance under 11 U.S.C. § 366, then that debt shall, upon application of said utility, become a Class 1 claim under this plan. This priority shall be deemed adequate assurance of the utilities' future payments.

14. Upon completion of this plan, all debts listed in the debtors' chapter 13 statement, except those excepted by 11 U.S.C. § 1328(a)(1) or (a)(2) shall be discharged.

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	
EDWARD J. & DEBORA A. DAVENPORT, Debtors,	CHAPTER 13
EDWARD & DEBORA DAVENPORT 7926 FRANKFORD AVENUE PHILADELPHIA, PA 19136, Plaintiffs,	BKY. NO. 87-02395F
v.	ADV. NO. 87-
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE OFFICE OF FAIR P.O. BOX 8016 HARRISBURG, PA 17105-8016 and COURT OF COMMON PLEAS OF BUCKS COUNTY ADULT PROBATION AND PAROLE DEPT. P.O. BOX 821 DOYLESTOWN, PA 18901, and EDWARD SPARKMAN, TRUSTEE SUITE 1254, PUBLIC LEDGER BLDG. 6TH & CHESTNUT STREETS PHILADELPHIA, PA 19106, Defendants.	

COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

I. PRELIMINARY STATEMENT

This is an action brought by husband and wife debtors to determine the dischargeability of their debt to the defendant Pennsylvania Department of Public Welfare (DPW) for their fraudulent receipt of public assistance benefits.

II. JURISDICTION

2. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334.

III. PARTIES

3. Plaintiffs are Edward and Debora Davenport, the debtors in this matter, who reside at 7926 Frankford Avenue, Philadelphia, PA 19136. They filed this Chapter 13 proceeding on May 15, 1987.

4. Defendant DPW is an agency of the Commonwealth of Pennsylvania.

5. Defendant Court of Common Pleas of Bucks County, Adult Probation and Parole Department (Probation Department) is the county agency that oversees the probation of adult offenders in Bucks County.

6. Defendant Edward Sparkman is the Chapter 13 Trustee in this matter and as such is required to be named in this action.

7. On September 17, 1986, plaintiffs were sentenced by the Court of Common Pleas of Bucks County to one year probation on the condition that they make restitution in the amount of $2072.40 by September 17, 1987. This sentence was based on the debtor's fraudulent receipt of public assistance benefits.

8. The debtors were each ordered to pay the restitution at the rate of $208.00 per month beginning December, 1986. See letter of December 3, 1986 from Beverly Elsner, Restitution Bookkeeper, to plaintiffs, attached hereto as Exhibit A.

9. The debtors have made no payments to the Probation Department because their income does not permit that expense.

10. The debtors have listed this restitution debt in their Chapter 13 Statement.

11. On July 2, 1987, the defendant Probation Department wrote to the debtors and notified them of a pre-violation hearing scheduled for August 6, 1987. A copy of the July 2 letter is attached hereto as Exhibit B.

12. Debtor's counsel wrote back to the Probation Department, on July 20, 1987, advising it of pending legal issues involving the discharge-ability of the debt and requested defendant to withdraw the probation violation charges against the debtors until the legal issues have been resolved. A copy of that letter is attached hereto as Exhibit C.

13. The Probation Department proceeded with the pre-violation hearing on August 6 and indicated that it will schedule a violation of probation hearing within the next month or two.

14. The debt owed to DPW and currently being enforced and attempted to be collected by the Probation Department is a dischargeable debt within the meaning of the Bankruptcy Code.

WHEREFORE, plaintiffs request the following relief:

1. That this court declare that DPW's claim for restitution is a dischargeable debt in this bankruptcy case;

2. That this court enjoin the Probation Department from taking any further action or attempt to collect the restitution debt from the debtors; and

3. That this court order such further relief as is necessary in the interests of justice.

/s/ David A. Searles
DAVID A. SEARLES
Attorney for Debtors/Plaintiffs

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
3156 Kensington avenue
Philadelphia, PA 19134-2483
(215) 427-4850

(Certificate of Service Omitted in Printing.)

Adult Probation and Parole Department

COURT OF COMMON PLEAS OF BUCKS COUNTY

Seventh Judicial District
of Pennsylvania Bucks County Courthouse
P.O. Box 821,
Doylestown, Pennsylvania 18901
(215) 348-6634

Francis V. Crumley
Chief Adult Probation
& Parole Officer

Isaac S. Garb
President Judge

December 3, 1986

Edward Davenport
Debra Davenport
8017 Frankford Ave.
Phila., PA. 19136

Dear Mr. & Mrs. Davenport:

On Sept. 17, 1986, you were sentenced to 1 yr. probation with the stipulation that you make restitution in the amount of $2,072.40 by Sept. 17, 1987.

So that you will be able to more easily complete your restitution obligation, you should send monthly payments in the amount of $208.00 by the 15th of each month, making your first payment on Dec., 1986.

You can make your check or money order payable to the Adult Probation Dept. and mail it to Post Office Box 821, Doylestown, PA. 18901.

EXHIBIT A

If you have any questions concerning this matter, please do not hesitate to contact me, as you must complete this restitution obligation in order not to violate your probation.

Sincerely,

/s/ Beverly Elsner

Beverly Elsner
Restitution Bookkeeper

:be
cc file
P.S. Please be advised that you were each ordered to pay restitution in the amount of $2,072.40. In order to have the obligation paid in full by your termination date, payments would have to be make in the amount of $208.00/mo. per individual. Balance remaining on termination date will mean the case will have to go back to Court.

Adult Probation and Parole Department

COURT OF COMMON PLEAS OF BUCKS COUNTY

Seventh Judicial District
of Pennsylvania Bucks County Courthouse
P.O. Box 821,
Doylestown, Pennsylvania 18901
(215) 348-6634

Francis V. Crumley
Chief Adult Probation
& Parole Officer

Isaac S. Garb
President Judge

Mr. Edward Davenport
Mrs. Edward Davenport
8017 Frankford Avenue
Philadelphia, PA. 19136

RE: Bill Nos. 3154, 3155/86

Dear Mr. and Mrs. Davenport:

By this letter, you are directed to appear at the Bucks County Adult Probation Department on Thursday, August 6, 1987, at 9:30 a.m. for a pre-violation (Gagnon I) hearing. You have been charged with violating your probation/parole as follows:

1. Failure to pay restitution.

Please be advised that you may be represented by counsel at this hearing if you so desire. It is your responsibility to make these arrangements. If you desire to be represented by counsel and cannot afford counsel, contact the Public Defender's Office immediately.

EXHIBIT B

At the time of the hearing you will be able to present evidence and witnesses in your behalf. You will have the opportunity to hear any evidence against you and confront any adverse witnesses.

You may elect to waive this hearing by signing the waiver below and returning it to the Probation Department. If you waive the pre-violation hearing, a violation hearing (Gagnon II) will be scheduled before the Judge who initially sentenced you. All alleged violations will then be heard by that Judge.

If you fail to appear for this hearing, it shall be deemed that you have consented to have the hearing proceed in your absence. The hearing may also be postponed for good cause. You must contact the probation Department prior to the hearing to request such a continuance.

Sincerely,

/s/ Paul L. Ferlise

Paul L. Ferlise
Adult Probation/Parole Officer

/s/ R. Keith Galloway

R. Keith Galloway
Supervisor

:cng
cc:File

WAIVER OF GAGNON I

I hereby waive the previously outlined Gagnon I hearing. This decision is made freely and voluntarily and with full knowledge of the consequences of this waiver.

_____ _____

Date Signature

COMMUNITY LEGAL SERVICES, INC.
Law Center Northeast
Flomar Building
3156 Kensington Avenue
Philadelphia, PA 19134-2483
215-427-4850

July 20, 1987

R. Keith Galloway, Supervisor
Adult Probation and Parole Department
Court of Common Pleas of Bucks County
Bucks County Courthouse
P.O. Box 821
Doylestown, PA 18901

RE: Edward & Dabora Davenport
Bill Nos. 3154, 3155/86

Dear Mr. Galloway:

This letter will confirm our telephone conversation of July 16, 1987.

I informed you that Mr. and Mrs. Davenport, who have been charged with violating probation/parole for failure to pay restitution, have filed for bankruptcy in Philadelphia. A copy of their petition is enclosed.

I also brought to your attention the recent Philadelphia Bankruptcy Court case of Steffler v. Pennsylvania Department of Public Welfare, a copy of which is also enclosed. This case holds that a Chapter 13 bankruptcy debtor can discharge a restitution debt arising out

EXHIBIT C

of welfare fraud. This case has been appealed by the Pennsylvania Department of Public Welfare so the question of dischargeability of the debt is not finally settled. However, I believe it is at least a close enough question that your Probation Department should seriously consider withdrawing the charges against the Davenports until the courts have decided the matter.

The Davenports will be applying to the Bucks County Public Defender for representation in this matter. They will consult with their counsel as to whether they wish to waive their rights to the pre-violation hearing.

Very truly yours,

/s/ David A. Searles

DAVID A. SEARLES

DAS/js
Enclosures

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	
EDWARD and DEBORA	:	
DAVENPORT	:	CHAPTER 13
Debtor	:	Case No. 87
	:	02395F
EDWARD & DEBORA	:	
DAVENPORT	:	
Plaintiff,	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENN.	:	
DEPT. OF PUBLIC WELFARE	:	
COURT OF COMMON PLEAS	:	
OF BUCKS COUNTY	:	
Defendant	:	
	:	
and EDWARD SPARKMAN,	:	
Trustee	:	Adversary
	:	Proceeding
	:	No. 87-0737

DEPARTMENT OF PUBLIC WELFARE'S ANSWER TO COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

AND NOW, comes the Commonwealth of Pennsylvania, Department of Public Welfare, and answers the complaint as follows:

1. Admitted in part; Denied in part. It is admitted that the action is brought by husband and wife debtors. It

is admitted that the debtors fraudulently received public assistance benefits. It is admitted that the action is brought to determine dischargeability of an obligation. It is denied that the criminal restitution obligation is a debt within the meaning of the Bankruptcy Code.

2. Denied. It is specifically denied that the bankruptcy court has jurisdiction to entertain a complaint seeking to enjoin a state criminal court proceeding.

3. Admitted.

4. Admitted.

5. The averments of paragraph 5 do not require a response by the answering defendant.

6. Admitted.

7. Admitted. By way of further answer, it is averred that the sentence was based not only upon the debtors' guilty plea to fraudulent receipt of public assistance benefits, but was also based upon the debtors ability to pay restitution. The order of restitution was, in itself, a sentence.

8. Admitted.

9. Admitted in part; Denied in part. It is admitted that no payments have been made. It is denied that their income does not permit that expense. To the contrary, the restitution payments were set at a level determined by the court to be within their means.

10. The Commonwealth of Pennsylvania, Department of Public Welfare does not have a copy of the Chapter 13 statement, and thus is without information with regard to the

averments of paragraph 10. The same, therefore, are denied.

11-13. The averments of paragraphs 11, 12, and 13 do not require a response by the answering defendant.

14. Denied.

WHEREFORE, the Commonwealth of Pennsylvania, Department of Public Welfare, prays this Honorable Court dismiss the adversarial complaint.

DATE: September 11, 1987

/s/ Mary B. Seiverling
Mary Benefield Seiverling
Assistant Counsel
Pa. Department of Public Welfare
Office of Fraud and Abuse
Investigation and Recovery
P.O. Box 8016
Civil Recovery Division
Harrisburg, PA 17105-8016
Attorney I.D. #36520
(717) 783-7783

(Certificate of Service Omitted in Printing.)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
EDWARD J. & DEBORA A. DAVENPORT,	:	CHAPTER 13
debtors	:	BKY. NO. 87-02395F
EDWARD & DEBORA DAVENPORT,	:	ADVERSARY
plaintiffs	:	NO. 87-0737
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE; COURT OF COMMON PLEAS OF BUCKS COUNTY, ADULT PROBATION AND PAROLE DEPARTMENT; EDWARD SPARKMAN, TRUSTEE,	:	
defendants	:	

ANSWER OF DEFENDANT
COURT OF COMMON PLEAS
OF BUCKS COUNTY, ADULT PROBATION
AND PAROLE DEPARTMENT

Defendant Court of Common Pleas of Bucks County, Adult Probation and Parole Department, by its attorney, John D. Blumenthal, as follows:

1. No answer required.

2. Denied as a conclusion of law.

3-5. Admitted.

6. Admitted that the defendant Edward Sparkman is the Trustee in this matter; the remaining allegations of paragraph 6 are denied as a conclusion of law.

7-13. Denied. After reasonable investigation, answering defendant is without sufficient information with which to admit or deny the allegations of the foregoing paragraphs. Proof thereof is therefore demanded at trial, if relevant.

14. Denied as a conclusion of law.

WHEREFORE, answering defendant respectfully requests that the Court dismiss plaintiff's Complaint.

AFFIRMATIVE DEFENSES

15. Restitution is not a debt subject to discharge under the Bankruptcy Code.

16. Restitution is an exception to those debts dischargeable in bankruptcy under 11 U.S.C. § 523(a)(7). See Kelly v. Robinson, 107 S.Ct. 353 (1986).

WHEREFORE, answering defendant respectfully requests that the Court dismiss plaintiff's complaint.

Respectfully submitted,

/s/ John D. Blumenthal
JOHN D. BLUMENTHAL
Assistant County Solicitor
Bucks County Courthouse
Doylestown, PA 18901
(215) 348-0880

(Certificate of Service Omitted in Printing.)

COMMONWEALTH OF PENNSYLVANIA :
ss
COUNTY OF BUCKS :

John D. Blumenthal, having been duly sworn according to law, deposes and says that he is the attorney in the above entitled action and that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

/s/ John D. Blumenthal

Sworn to and subscribed before
me this 21st day of September, 1987.

/s/ Judith R. Blumenthal
NOTARY PUBLIC

My commission expires:
Judity R. Blumenthal, Notary Public
Doylestown Borough, Bucks County
My Commission Expires Jan. 27, 1990.
Member, Pennsylvania Association of
Notaries

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
EDWARD J. DAVENPORT, SR.	:	
a/k/a EDWARD DAVENPORT	:	
and DEBORA A. DAVENPORT	:	
Debtors	:	Bankruptcy
	:	No. 87-02395F
_____	:	
EDWARD & DEBORA	:	
DAVENPORT	:	
Appellees	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENN-	:	
SYLVANIA, DEPARTMENT	:	
OF PUBLIC WELFARE	:	
and COURT OF COMMON	:	
PLEAS OF BUCKS COUNTY,	:	
ADULT PROBATION AND	:	
PAROLE DEPT. and EDWARD	:	
SPARKMAN, TRUSTEE	:	
Appellants	:	Adversary
	:	No. 87-0737F
_____	:	

STIPULATION FOR SUPERSEDEAS

Edward J. Davenport, Sr. and Debora A. Davenport ("Debtors") and the Department of Public Welfare of the Commonwealth of Pennsylvania ("DPW"), the Court of Common Pleas of Bucks County, Adult Probation and Parole Department ("Adult Probation"), and-

Edward Sparkman, Esquire, Standing Chapter 13 Trustee, do hereby stipulate and agree as follows:

1. On September 7, 1986, Debtors entered guilty pleas to the crime of welfare fraud in the Bucks County Court of Common Pleas.

2. On May 15, 1987, Debtors filed a voluntary petition in bankruptcy under Chapter 13.

3. On August 12, 1987, Debtors commenced an adversary proceeding seeking determination of the dischargeability of their criminal restitution obligations.

4. On March 8, 1988, the Honorable Bruce Fox, entered an order set forth as Exhibit "A" and incorporated herein by reference ("Order") which order resolved the adversary proceeding.

5. On March 18, 1988, DPW appealed from the Order.

6. On March 23, 1988, Adult Probation appealed from the Order.

7. The parties stipulate and agree that the Order should be stayed pending appeal under the following terms:

a) Debtors shall continue to make the court-order restitution payments;

b) Debtors shall make the payments to their attorney who will hold said funds in escrow;

c) Any payments made by Debtors to Adult Probation shall be forwarded to Debtors' attorneys, to be held in escrow;

d) Failure of Debtors to make payments to Adult Probation shall not result in the scheduling of a violation of probation hearing;

e) Any failure of Debtors to make payments under this stipulation shall not render the appeals from the Order moot.

8. When all appeals from the Order have ended, the escrowed funds will be relinquished to the prevailing party unless otherwise ordered by court or by further agreement of the parties.

9. Any discharge received by the Debtors under § 1328 shall not discharge the Debtors' criminal restitution unless and until all appeals from the Order have ended and the Debtors have prevailed.

April 11, 1988
DATE

/s/ Mary B. Seiverling
MARY B. SEIVERLING
Deputy Attorney General
Office of Attorney General
Litigation Section
15th Floor - Strawberry Square
Harrisburg, PA 17120
Counsel for Department of
Public Welfare

DATE

DAVID A. SEARLES,
Community Legal
Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-
1483

Counsel for the debtors/
appellees
Edward Davenport and
Debora Davenport

DATE

EDWARD SPARKMAN, ESQUIRE
1254 Public Ledger Bldg.
6th and Chestnut Streets
Philadelphia, PA 19106
Standing Chapter 13
Trustee

DATE

MICHAEL A. KLIMPL,
ESQUIRE
Assistant County
Solicitor
Bucks County Courthouse
Doylestown, PA 18901
Counsel for Appellants,
Court of
Common Pleas of Bucks
County,
Adult Probation and
Parole Department

This Stipulation is hereby approved by the Court.

BRUCE FOX
Bankruptcy Judge

DATE: April , 1988

Copies to be distributed to counsel on attached list.

EDWARD DAVENPORT
DEBORA DAVENPORT

Chapter 13
Bankruptcy No. 87-02395F
Adversary No. 87-0737F

cc: David A. Searles, Esq.
Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Ave.
Philadelphia, PA 19134-1483

Edward Sparkman, Esq.
1254 Public Ledger Bldg.
6th and Chestnut Sts.
Philadelphia, PA 19106

Michael A. Klimpl, Esq.
Assistant County Solicitor
Bucks County Courthouse
Doylestown, PA 18901

Mary B. Seiverling
Deputy Attorney General
Office of Attorney General
15th Floor - Strawberry Sq.
Harrisburg, PA 17120

DATE:

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
EDWARD J. DAVENPORT, SR.:		
a/k/a EDWARD DAVENPORT	:	
and DEBORA A. DAVENPORT	:	
Debtors	:	Bankruptcy
	:	No. 87-02395F
_____	:	
EDWARD & DEBORA	:	
DAVENPORT	:	
Plaintiffs	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENN-	:	
SYLVANIA, DEPARTMENT	:	
OF PUBLIC WELFARE	:	
and COURT OF COMMON	:	
PLEAS OF BUCKS COUNTY,	:	
ADULT PROBATION AND	:	
PAROLE DEPT. and EDWARD	:	
SPARKMAN, TRUSTEE	:	
Defendants	:	Adversary
	:	No. 87-0737F
_____	:	

. . . . . .

O R D E R

. . . . . .

AND NOW, this 8 day of March, 1988, upon consideration, it is hereby ORDERED that the obligation of the debtors to make payments to the Buck

EXHIBIT "A"

County Adult Probation and Parole Department for the purposes of restitution to the Commonwealth of Pennsylvania Department of Public Welfare represents a dischargeable, unsecured debt in this chapter 13 case. Any payments made by plaintiffs and received by defendants shall be turned over to the standing chapter 13 trustee.

/s/ Bruce Fox
BRUCE FOX
United States Bankruptcy
Judge

IN THE CRIMINAL COURT OF THE
COUNTY OF BUCKS

Criminal Action No. 3154 1986

COMMONWEALTH OF PENNSYLVANIA

VS.

DEBORAH A. DAVENPORT

THE District Attorney of Bucks County by this information charges that, on or about the 4/10/85 & Divers times prior, specifically 9/26/84 to 4/10/85 in said County, one DEBORAH DAVENPORT

(1) PUBLIC ASSISTANCE LAWS (90030)(481) F3° did, by means of willfully false statement of mispresentation attempt to secure Public Assistance monies in the amount of more than Three Hundred Dollars ($300.00), to wit, $4,144.80

(2) PUBLIC ASSISTANCE LAWS (90030)(481) M1° did, by means of willfully false statement of misrepresentation secure Public Assistance monies in the amount of $2,853.80,

(3) PUBLIC ASSISTANCE LAWS (90030)(481) M2° did, by means of willfully false statement of misrepresentation secure Food Stamps in the amount of $1,291.00,

all of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/_____
District Attorney
Alan M. Rubenstein

BUCKS COUNTY
SENTENCE SHEET

COMMONWEALTH: Deborah Davenport

NO. 86-3154

JUDGE: Isaac S. Garb

CLERK: Betty

D.A.: Laura Cianculli

PD/DEF: _____

NOTES BY: John

DATE: 9/17/86

/s/ Isaac S. Garb
J.

BUCKS COUNTY PRISON

On Information No._____19__ the Court (having received or waives a pre-sentence investigation) orders and directs that the defendant pay the cost of prosecution and undergo imprisonment in the Bucks County Prison for not lease than ____ nor more than ____ and stand committed until sentence is complied with. Credit it to be given for all time spent in custody as is provided for by Sec. 1360 of the Sentencing Code of 1974 and by Pa. Rule of Criminal Procedure 1406 (b) and (c).

STATE PENITENTIARY

On Information No._____19__ the Court (having received or waives a pre-sentence investigation) orders and directs that the defendant pay the cost of prosecution and undergo imprisonment for not less than ____ years nor more than ____ years in a State Correctional Institution as shall be designated by the Bureau of Correction and, therefore, sent to the Correction Diagnostic and Classification center in Graterford, Pa., for this purpose. Credit is to be given for all time spent in custody as is provided for by Sec. 1360 of the Sentencing code of 1974 and by Pa. Rule of Criminal Procedure 1406 (b) and (c).

Defendant is directed to stand committed until judgment by fully complied with.

ARD

On Information No.____ 90__ the defendant having waived his right to a speedy trial is release on probation for a period of _____ months upon the following conditions. Defendant is directed to pay court costs and make restitution in the sum of $____ within a period of _____ months, and shall follow all specific conditions as hereinafter set forth.

INFORMATION NO. 3154 19 86

The defendant is released on probation for a period of 1 year under the supervision of the (Bucks County Probation Officer or State Parole Board) from the following conditions. Defendant to pay within 30 days cost of prosecution and in lieu of a fine pay $_____ for the use of the County of Bucks (and make restitution in the sum of $2,072.40 in monthly installments of $_____ by making payment to his probation officer) and abide by the rules and regulations laid down by his probation officer, obey the law in all other respects and stand committed until the same be complied with.

BENCH WARRANT

Upon motion of the District Attorney a bench warrant is issued for the attachment of_____.

CONSECUTIVE SENTENCES

The sentence heretofore imposed on Information No.____ 19__ is to begin and take effect at the expiration of the minimum sentence imposed on Information No.___ 19____, and, therefore, the sentence to be served by the defendant for the total of all offenses with respect to which sentence is imposed is a minimum of not less than _____ years or a maximum of _____ years.

SUSPENDED SENTENCE

On Information No._____ 19__ defendant is directed to pay the cost of prosecution and sentence is suspended.

SENTENCE - WOMEN - MUNCY

The Court finding the defendant _____ to be a female over the age of 16 years, (having received or waives a pre-sentence investigation) orders and directs that the undergo confinement in the state industrial home for women at Muncy, Pa., for a period of not less than _____ years nor more than _____ years and there to be fed, clothed and treated in all respects as provided by law and stand committed until the same be complied with. Credit is to be given for all time spent in custody as is provided for by Sec. 1360 of the Sentencing Code of 1974 and by Pa. Rule of Criminal Procedure 1406 (b) and (c).

GUILTY WITHOUT FURTHER PENALTY

On Information No. ____ 19____, the Court finding that no useful purpose would be served by imposing an order of probation, the Court hereby orders and directs the defendant to pay the cost of prosecution and imposes the sentence of guilty without further penalty.

FINE ONLY

On Information No. _____ 19____, the Court finding that the defendant is able to pay a fine orders and directs the defendants to pay the cost of prosecution and a fine in the sum o $_____ to the Commonwealth for the ue of the (State Treasurer or the County of Bucks). The total fine and costs are to be paid in _____ equal monthly installments.

SPECIAL PROVISIONS:

IN THE CRIMINAL COURT OF THE
COUNTY OF BUCKS

Criminal Action No. 3155 1986

COMMONWEALTH OF PENNSYLVANIA

VS.

EDWARD J. DAVENPORT

THE District Attorney of Bucks County by this information charges that, on or about the 4/10/85 & divers times specifically 9/26/84 to 4/10/85 in said County, one EDWARD DAVENPORT

(1) PUBLIC ASSISTANCE LAWS (90030)(481) F3° did, by means of willfully false statement of mispresentation attempt to secure Public Assistance monies in the amount of more than Three Hundred Dollars ($300.00), to wit, $4,144.80

(2) PUBLIC ASSISTANCE LAWS (90030)(481) M1° did, by means of willfully false statement of misrepresentation secure Public Assistance monies in the amount of $2,853.80.

(3) PUBLIC ASSISTANCE LAWS (90030)(481) M2° did, by means of willfully false statement of misrepresentation secure Food Stamps in the amount of $1,291.00,

all of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/
District Attorney
Alan M. Rubenstein

BUCKS COUNTY
SENTENCE SHEET

COMMONWEALTH: Edward J. Davenport

NO. 86-3155

JUDGE: Isaac S. Garb

CLERK: Betty

D.A.: Laura Cianculli

PD/DEF: Eric Kadish

NOTES BY: John

DATE: 9/17/86

/s/ Isaac S. Garb
J.

BUCKS COUNTY PRISON

On Information No._____19__ the Court (having received or waives a pre-sentence investigation) orders and directs that the defendant pay the cost of prosecution and undergo imprisonment in the Bucks County Prison for not lease than ____ nor more than ____ and stand committed until sentence is complied with. Credit it to be given for all time spent in custody as is provided for by Sec. 1360 of the Sentencing Code of 1974 and by Pa. Rule of Criminal Procedure 1406 (b) and (c).

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Defendant is directed to stand committed until judgment by fully complied with.

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The Court finding the defendant _____ to be a female over the age of 16 years, (having received or waives a pre-sentence investigation) orders and directs that the undergo confinement in the state industrial home for women at Muncy, Pa., for a period of not less than _____ years nor more than _____ years and there to be fed, clothed and treated in all respects as provided by law and stand committed until the same be complied with. Credit is to be given for all time spent in custody as is provided for by Sec. 1360 of the Sentencing Code of 1974 and by Pa. Rule of Criminal Procedure 1406 (b) and (c).

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FINE ONLY

On Information No. _____ 19____, the Court finding that the defendant is able to pay a fine orders and directs the defendants to pay the cost of prosecution and a fine in the sum of $_____ to the Commonwealth for the ue of the (State Treasurer or the County of Bucks). The total fine and costs are to be paid in _____ equal monthly installments.

SPECIAL PROVISIONS

CLIENT # 166 42 6977

ADULT PROBATION AND PAROLE DEPARTMENT

COUNTY OF BUCKS

INTERVIEWER FT.

DATA/HISTORY SHEET

DATE 9/17/86

Name	Address #1	House ☐ Apt. ☐	Munic.
DAVENPORT: Edward	8017 Frankford Ave. Phila., PA. 19136		
Alias/Nickname	**Address #2**	**Tel #** N/A	**Type**
N/A		**Address #3**	

Race	Sex	Hgt.	Wt.	Eyes	Hair	Citizen	Age	D.O.B.	Mrtl. Stat.
W	M	6'9"	258	grn.	brn.	USA	38	3/7/48	married

S.S. #	OTN #	FBI #	SPN #
166 42 6977	B552933-3		

Auto	Year	Color	Plate #	Operator #	State
'77 Chevy Impala					PA. license

PRIOR RECORD

Sent. Date	Place	Offense	Disposition
N/A			

PRESENT OFFENSE

Co./State Origin	Term & No.	Offense	Offense Class.	Prosecutor
	3155/86	Public Assistance Laws	F3	DPW Office

Summary (Include date & time of offense):

Defraud willfully, misrepresentation and food stamps laws

Wife is co-def, also rec'd probation

COURT DATA

Date of Sentence	Judge	ADA	Plea (X)
9/17/86	Garb	Cianculli	Trial by Judge ( )
		Def. Kadish	Trial by Jury ( )

Disposition	Fine	Costs	Restitution	Victim
1 yr. probation		117.16	$2,072.40	DPA

Special Conditions:

Pay costs w/in 30 days.

Pay restitution of $2,072.40.

Restitution Pay Schedule:

Probation Begins	Probation Expires	Parole Data	Parole Expires
9/17/86	9/17/87	Eff. Date / Parole Date	

146a 70a

Name	Relationship	Address	Phone #	Age
Debra	wife	same as P.		

EMPLOYMENT HISTORY

Employer Address	Phone #	Work Hrs/Days	Occupation	Dates	Wage
Welfare= Currently collects $41.00 a wk. Claims only source of income. (this should be checked out)					

EDUCATION

Highest Grade Completed 12th Date _____

Name/Address School Graduated Lincoln H.S.

Other _____

SERVICE RECORD

Branch U.S. Army I.D. # _____

Dates _____ Rank _____

DISCHARGE Honorable discharge

Tour of Duty Viet Nam, Korea

ADDICTION HISTORY

Drugs ( ) Alcohol ( ) None (X)

Comments _____

TREATMENT PROGRAM INVOLVEMENT

N/A

P receives medical treatment for back pr

CLASSIFICATION INFORMATION

CMC Class.	CMC Date	Risk Score	Needs Score	Level of Supv.	Supervisor Override Yes ___ No ___
Reason (if "yes" to override)					Date Override

Risk Reass. Score	Date	Needs Reass. Score	Date	PO #	Supv. #	Assess. Level	Supv. Over. Yes No	Level of Supv.

TERMINATION INFORMATION

Date Terminated _____ Final R/A Score _____

Date Terminated _____ Final N/A Score _____

REMARKS: _____

1472 71a

CLIENT # 162 44 6822

ADULT PROBATION AND PAROLE DEPARTMENT

COUNTY OF BUCKS

INTERVIEWER FL

DATA/HISTORY SHEET

DATE 9/17/86

Name	Address #1	House ☐ Apt. ☐	Munic.
DAVENPORT: Debra	~~3021~~ 7926 Frankford Ave. Phila., PA. 19136		
Alias/Nickname	**Address #2**	**Tel #**	**Type**
N/A		N/A	
		Address #3	

Race	Sex	Hgt.	Wt.	Eyes	Hair	Citizen	Age	D.O.B.	Mrtl. Stat.
W	F	5'1"	140	blue	brn	USA	31	6/18/55	married

F.S. #	OTN #	FBI #	SPN #
162 44 6822	B552934-4		

Auto	Year	Color	Plate #	Operator #	State
N/A					PA. license valid

PRIOR RECORD

Sent. Date	Place	Offense	Disposition
N/A			

PRESENT OFFENSE

Co./State Origin	Term & No.	Offense	Offense Class.	Prosecutor
	3154/86	Public Assistance Laws	F3	DPW

Summary (Include date & time of offense):

co-def. to husband. P violated laws of DPW fradulantly and received food stamps.

COURT DATA

Date of Sentence	Judge	ADA	Plea (X)
9/17/86	Garb	Cianculli	Trial by Judge ( )
		Def. N/A	Trial by Jury ( )

Disposition	Fine	Costs	Restitution	Victim
1 yr. prob.		122.16	$2,072.40	DPW

Special Conditions:

Pay ocurt costs w/in 30 days.

Pay restitution of $2,072.40.

Restitution Pay Schedule:

Probation Begins	Probation Expires	Parole Date	Parole Expires
9/17/86	9/17/87	EM. Date Parole Date	

D-1

132a 72c

FAMILY

Name	Relationship	Address	Phone #	Age
Edward	husband	same as P.		

EMPLOYMENT HISTORY

Employer Address	Phone #	Work Hrs/Days	Occupation	Dates	Wage
Dr. Groman Paneonis			medical assistant	1 yr.	$5.50/hr.
8019 Frankford Ave.					
Phila., PA.					

EDUCATION

Highest Grade Completed _____ Date _____

Name/Address School _____

GED. '85

Other _____

SERVICE RECORD

Branch N/A I.D. # _____

Dates _____ Rank _____

DISCHARGE _____

Tour of Duty _____

ADDICTION HISTORY

Drugs ( ) Alcohol ( ) None (X)

Comments _____

TREATMENT PROGRAM INVOLVEMENT

N/A

CLASSIFICATION INFORMATION

CMC Class.	CMC Date	Risk Score	Needs Score	Level of Supv.	Supervisor Override Yes ___ No ___

Reason (if "yes" to override) _____ Date Override _____

Risk Reass. Score	Date	Needs Reass. Score	Date	PO #	Supv. #	Assess. Level	Supv. Over. Yes No	Level of Supv.

TERMINATION INFORMATION

Date Terminated _____ Final R/A Score _____

Date Terminated _____ Final N/A Score _____

REMARKS: _____

133a 73c

(9)

NO. 89-156
IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

BRIEF FOR PETITIONERS

ERNEST D. PREATE, JR.
Attorney General

By: CALVIN R. KOONS
Senior Deputy Attorney General
Counsel of Record

MARY BENEFIELD SEIVERLING
Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General

Counsel for Petitioner
Commonwealth of Pennsylvania,
Department of Public Welfare

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

(Additional Counsel Listed
on Inside Cover)

Michael A. Klimpl, Esquire
107 East Oakland Avenue
Doylestown, PA 18901
(215) 348-1776

Counsel for Petitioner
Adult Probation and Parole Department
of the Court of Common Pleas
of Bucks County, Pennsylvania

QUESTION PRESENTED

Whether criminal restitution orders are dischargeable debts in proceedings under Chapter 13 of the Bankruptcy Code.

LIST OF ALL PARTIES

The petitioners are the Commonwealth of Pennsylvania, Department of Public Welfare and the Adult Probation and Parole Department of the Court of Common Pleas of Bucks County, Pennsylvania. Respondents are Edward J. Davenport and Debora A. Davenport.

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NO. 89-156
IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners

v.

EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania is reported at 83 B.R. 309 (Bankr. E.D.Pa. 1988) and is reprinted in the appendix to the petition at p. 68a-102a. The opinion of the

District Court is reported at 89 B.R. 428 (E.D.Pa. 1988) and is reprinted in the appendix to the petition at p. 59a-66a. The opinion of the Court of Appeals is reported at 871 F.2d 421 (3d Cir. 1989) and is reprinted in the appendix to the petition at p. 1a-58a.

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered its decision on March 28, 1989. The Commonwealth of Pennsylvania petitioned the Court for rehearing, and its petition was denied by order of April 27, 1989. The Commonwealth filed its petition for certiorari on July 26, 1989 and the Court granted the petition on October 2, 1989. The Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns primarily the following provisions of the Bankruptcy Code: 11 U.S.C. § 101(4) and (11) defining "claim" and "debt"; 11 U.S.C. § 523 pertaining to exceptions to discharge, and 11 U.S.C. § 1328 concerning the effect of discharge. Petitioners will also refer to Pa. Stat. Ann., tit. 62 § 481 (Purdon Supp. 1989) in which the crime of welfare fraud is defined and the penalty specified, and to 18 Pa. Cons. Stat. Ann. § 1106 (Purdon 1983) pertaining to criminal restitution orders. These statutes are set forth in the petition, at 6-11.

STATEMENT OF THE CASE

1. This case presents the issue of whether the respondents, having pled guilty to welfare fraud and having been sentenced to pay restitution as a condition of their probation, may discharge that portion of their criminal sentence by completing proceedings under Chapter 13 of the Bankruptcy Code. A Chapter 13 debtor who successfully completes his plan receives a discharge, with limited exceptions, of all "debts" as that term is used in the Bankruptcy Code. The question in this case is whether criminal restitution orders are "debts" and hence dischargeable. In Kelly v. Robinson, 479 U.S. 36 (1986), the Court expressed "serious doubts" id. at 50, about whether Congress intended criminal restitution obligations to be debts, but the Court did not resolve the

issue. Kelly arose under Chapter 7 of the Bankruptcy Code, which contains broader exceptions to discharge than does Chapter 13.[1] The Court held that one of these, codified at 11 U.S.C. § 523(a)(7), exempted criminal restitution obligations from discharge under Chapter 7, and thus found it unnecessary to decide whether they are "debts" in the first place. Id. This case presents that question.

2. The respondents pled guilty to welfare fraud in September of 1986. Joint App. 28a. They had unlawfully received $2,853.80 in cash assistance and $1,291.00 in food stamps. Joint App. 56a-57a, 63a-64a. The Court of

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[1]The scope of a Chapter 7 discharge is codified at 11 U.S.C. § 727, that of a Chapter 13 at 11 U.S.C. § 1328. The respondents were discharged pursuant to § 1328(a), which does not incorporate the exception of § 523(a)(7).

Common Pleas sentenced them to one year probation, and ordered each to pay restitution in the amount of $2,072.40, at the rate of $208.00 each per month beginning in December 1986. Joint App. 28a-29a.

Pennsylvania law requires that restitution be a part of the sentence in cases of welfare fraud, Pa. Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989), and that restitution payments be made to the County Court probation office, which maintains records and forwards the payments to the victim. 18 Pa. Cons. Stat. Ann. § 1106(e)(Purdon 1983). In the event of nonpayment, the probation officer can request the court to hold hearings to determine, in the first instance, whether there was a failure to make restitution and, if so, whether this failure constitutes a violation of the conditions of probation.

Id. at § 1106(f). If a violation occurred, the court, where appropriate, can find a defendant in contempt of court or revoke his probation. The Pennsylvania statute, however, does not authorize the court or the victim to enforce the criminal judgment through civil means such as attachment or lien. Id.

The respondents made no restitution payments, but in May of 1987 filed a joint petition under Chapter 13 of the Bankruptcy Code. Their petition listed the criminal restitution obligations as a debt payable to the Department of Public Welfare. Joint App. 17a-18a.

Chapter 13 bankruptcy governs the adjustment of debts of individuals with regular income. Under Chapter 13, the debtor remains in possession of his

assets, but commits his "disposable income" (defined at 11 U.S.C. § 1325) from future earnings to a repayment plan for distribution to creditors. 11 U.S.C. §§ 1321, 1322. Upon completion of the plan, the debtor is discharged.

Having received no restitution payments from the respondents after they filed for bankruptcy, the Bucks County Probation Office conducted a pre-violation hearing. Joint App. 34a. Shortly thereafter, the respondents initiated an adversary proceeding in Bankruptcy Court naming as defendants the Department of Public Welfare and the Probation Department and asking for a declaration that the restitution order was a dischargeable debt. Joint App. 26a-38a.

3. The Bankruptcy Court held that the restitution order was a dischargeable, unsecured "debt". Pet. App.

104a. The District Court reversed, holding that the restitution order was not a "debt" since the victim did not possess a "right to payment," and concluding that a discharge of the ordered restitution would both ignore this Court's direction in Kelly v. Robinson, 479 U.S. 36 (1986), and violate principles of federalism enunciated in Younger v. Harris, 401 U.S. 37 (1971). Pet. App. 59a-67a. Subsequently, the respondents having completed their plan,[2] the Bankruptcy Court ordered their "debts" discharged.

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[2]Because of the pending litigation concerning dischargeability, the parties entered into a stipulation which provided that all restitution payments were to be paid into an escrow account and would be relinquished to the prevailing party upon exhaustion of all appeals. Joint App. 47a-55a. The failure to make restitution during this period, however, would not result in revocation of probation. Id. at 49a.

4. The Court of Appeals reversed and remanded with directions to affirm the order of the Bankruptcy Court.[3] Pet. App. 1a-58a. The Court of Appeals conceded that the majority of bankruptcy courts considering the issue have rejected the contention that a criminal restitution obligation is a "debt" under the Bankruptcy Code.[4] The Court also recognized that in Kelly this

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[3]On appeal, this case was consolidated with two others in which the District Court had held that restitution orders are not dischargeable debts. Because the debtors in those cases had not yet completed their Chapter 13 plans or received their discharges, the Court of Appeals held that those cases were not ripe for decision. Pet. App. 12a-13a.

[4]See, e.g., In re Norman, 95 B.R. 771 (Bankr. D. Colo. 1988); In re Johnson, 32 B.R. 614 (Bankr. D. Colo 1983); In re Magnifico, 21 B.R. 800 (Bankr. Ariz. 1982); In re Oslager, 46 B.R. 58 (Bankr. M.D.Pa. 1985); In re Kohr, 82 B.R. 706 (Bankr. M.D. Pa. 1988);

(FOOTNOTE CONTINUED ON NEXT PAGE)

Court declared that it had "serious doubts" as to whether Congress intended criminal restitution orders to constitute "debts." Indeed, the Court of Appeals went so far as to state that "facially there is considerable merit" to arguments against treating them as such. Pet. App. 17a-19a.

Nevertheless, the Court of Appeals held that such orders are dischargeable "debts." The Court of Appeals relied upon the idea that Congress intended the broadest possible definition of the word "debt," holding

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

In re Pellegrino, 42 B.R. 129 (Bankr. D.Conn. 1984); In re Mead, 41 B.R. 838 (Bankr. D. Conn. 1984); Robinson v. McGuigan, 45 B.R. 423 (Bankr. D. Conn. 1984), rev'd sub nom. In re Robinson, 776 F.2d 30 (2d Cir. 1985), rev'd sub nom. Kelly v. Robinson, 479 U.S. 36 (1986); In re Button, 8 B.R. 692 (Bankr. W.D.N.Y. 1981).

that the victim's right to obtain a civil judgment and the Probation Department's right to enforce the restitution order satisfied the Code's "right to payment" requirement. Pet. App. 23a-26a.

The Court of Appeals looked also to Chapter 7, and to the provisions governing the automatic stay of proceedings in other courts. Chapter 7 exempts fines, penalties, and forfeitures from discharge and 11 U.S.C. § 362(b)(1) exempts from the automatic stay the commencement or continuation of criminal proceedings against the debtor. The Court of Appeals reasoned that the exception contained in Chapter 7 would not be necessary if criminal judgments were not "debts," and noted that Congress had expressly excepted criminal proceedings from the automatic stay but

had failed to except criminal judgments from the broad definition of "debts." Pet. App. 30a, 34a.

The Court of Appeals added that its decision "comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7," Pet. App. 31a, (footnote omitted) and emphasized the broader discharge available to debtors under Chapter 13.

The Court of Appeals noted this Court's "admonition that 'the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief" (Pet. App. 40a, quoting Kelly, 479 U.S. at 49), but said that Congress,

not the courts, must "cure any perceived 'defects' in [the Bankruptcy Code]... which arguably affect state criminal proceedings." Pet. App. 40a.

Judge Hutchinson dissented. Pet. App. 43a-58a. He wrote that "the concerns which prompted the Supreme Court's reservations [in Kelly] require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy." Pet. App. 45a. The broader discharge provisions of Chapter 13 do not, in his view, alter this basic conclusion, nor do they determine in the first instance whether a criminal restitution order is a debt. Pet. App. 58a, n.5. In consideration of the pre-Code treatment of criminal sanctions, the Court's direction in Kelly, and the absence of

clear legislative intent to alter pre-Code practice, Judge Hutchinson could not conclude "that Congress intended such a far reaching intrusion on the states' administration of their criminal justice system as the majority's result entails." Id.

The Court granted certiorari.

SUMMARY OF ARGUMENT

Criminal restitution orders are not "debts" within the meaning of the Bankruptcy Code because state law affords no "right to payment" to either the victim or the court system. Although the victim is incidentally benefitted, the goal of restitution is not repayment of money, but enforcement of state criminal laws and rehabilitation of criminal defendants. Neither the victim nor the court system stands in the shoes of a civil creditor with attendant civil remedies for debt collection.

As a matter of federal law and statutory construction, criminal restitution orders are not "debts" because Congress has not clearly expressed an

intention that they be considered "debts." When, as here, a proposed interpretation of the Bankruptcy Code would alter pre-Code law and affect state and federal interests of great importance, the Court has required indications of Congressional intent to support the proposed interpretation with unmistakeable clarity. Neither the language of the Code, nor its legislative history, clearly indicates that Congress intended, by enacting the Code, to make criminal judgments "debts."

ARGUMENT

A CRIMINAL RESTITUTION ORDER IS NOT A DEBT ENCOMPASSED BY THE BANKRUPTCY CODE.

The issue reserved in Kelly, whether criminal restitution orders are "debts", is of enormous importance to the states' administration of criminal justice. Restitution is permitted as a sentencing option in all states (Petition, p. 26). If restitution orders are "debts," the Commonwealth of Pennsylvania alone will be unable to enforce the more than 5,000 criminal sentences of restitution entered each year, in the event the individuals sentenced choose to file bankruptcy petitions. (Petition pp. 26-27). The Court in Kelly recognized that such a holding would lead to the "unseemly" result of requiring state prosecutors to

submit the judgments of their criminal courts to federal bankruptcy courts, could lead to "federal remission of judgments imposed by state criminal judges," and in turn would "hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." 479 U.S. at 48-49. Limiting the flexibility of sentencing options available to judges short of incarceration can only exacerbate current problems of prison overcrowding. As demonstrated below, the result the Court of Appeals reached in this case is not only "unseemly," but inconsistent with the language, history, and purpose of the Bankruptcy Code.

A. A Criminal Restitution Order is Not a "Right to Payment" and Therefore Not a "Debt" Within the Meaning of the Bankruptcy Code.

The Code defines a "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(4)(A).[5] The petitioners submit that in Pennsylvania, neither the

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[5]The Code also defines "claim" in equitable terms as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;" 11 U.S.C. § 101(4)(B).

victim of a crime nor the Probation Department possesses a "right to payment" of a restitution order, and that such order therefore is not a "debt" within the meaning of the Bankruptcy Code. The discharge provisions of § 727 and § 1328 operate only to discharge "any debt." Thus, whatever may be the nature of a criminal's obligation to make restitution, if it is not a "debt," the bankruptcy court has no authority to discharge it.

1. Whether a "right to payment" exists is a question of state law, In re Frenville, 744 F.2d 332, 337 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985), but as a general matter it is clear that the purposes of criminal restitution are quite distinct from those of compensation for loss. In

Kelly the Court observed that the context in which a criminal restitution order is imposed undermines the conclusion that it is a judgment for the benefit of the victims. 479 U.S. at 35. The Court observed that the victim has no control over the decision to order restitution or the determination of the amount and that this decision generally turns not on the victim's injury, but on the penal goals of the state and the situation of the defendant.

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Id., quoting In re Pellegrino, 42 B.R. 129, 133 (Bankr. D. Conn. 1984). Thus, the focus is not on the debtor/creditor relationship or the collection of a debt, but rather on state penological goals.

The Pennsylvania law governing restitution is similar to the Connecticut law analyzed in Kelly and supports the conclusion that neither the victim nor the Probation Department has a right to payment. When a criminal defendant is convicted of a crime involving theft, conversion or decreasing the value of property, or involving personal injury, the court may impose restitution either as a part of the sentence or as a condition of probation or parole. 18 Pa. Cons. Stat. Ann. § 1106(a)-(c) (Purdon 1983). In the case of welfare

fraud, such restitution is mandatory. Pa. Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989).[6] But cf. Id. at § 1106(c)(1).[7]

Like the Court in Kelly, Pennsylvania Courts recognize that an order of restitution does not amount to an award of damages and that, in fixing

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[6]The statute provides that "any person committing a crime enumerated... shall be ordered to pay restitution of any moneys he has received by reason of any false statement...." The statute permits payment by lump sum, monthly installment, or by any other schedule deemed just by the sentencing court. The time period for making the restitution is not limited by the statute. Ibid.

[7]Notwithstanding the mandatory language of Pa. Stat. Ann. tit. 62, § 481 (Purdon Supp. 1989), there is some authority to suggest that a court must still take the financial resources of the defendant into consideration. See, e.g., Commonwealth of Pennsylvania v. Melnyk, 378 Pa. Super. Ct. 42, 548 A.2d 266 (1988), appeal denied, ___ Pa. ___, 562 A.2d 319 (1989). But see Commonwealth v. Ferguson, ___ Pa. Super. Ct. ___, 552 A.2d 1075 (1988).

Court declared that it had "serious doubts" as to whether Congress intended criminal restitution orders to constitute "debts." Indeed, the Court of Appeals went so far as to state that "facially there is considerable merit" to arguments against treating them as such. Pet. App. 17a-19a.

Nevertheless, the Court of Appeals held that such orders are dischargeable "debts." The Court of Appeals relied upon the idea that Congress intended the broadest possible definition of the word "debt," holding

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that the victim's right to obtain a civil judgment and the Probation Department's right to enforce the restitution order satisfied the Code's "right to payment" requirement. Pet. App. 23a-26a.

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had failed to except criminal judgments from the broad definition of "debts." Pet. App. 30a, 34a.

The Court of Appeals added that its decision "comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7," Pet. App. 31a, (footnote omitted) and emphasized the broader discharge available to debtors under Chapter 13.

The Court of Appeals noted this Court's "admonition that 'the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief" (Pet. App. 40a, quoting Kelly, 479 U.S. at 49), but said that Congress,

not the courts, must "cure any perceived 'defects' in [the Bankruptcy Code]... which arguably affect state criminal proceedings." Pet. App. 40a.

Judge Hutchinson dissented. Pet. App. 43a-58a. He wrote that "the concerns which prompted the Supreme Court's reservations [in Kelly] require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy." Pet. App. 45a. The broader discharge provisions of Chapter 13 do not, in his view, alter this basic conclusion, nor do they determine in the first instance whether a criminal restitution order is a debt. Pet. App. 58a, n.5. In consideration of the pre-Code treatment of criminal sanctions, the Court's direction in Kelly, and the absence of

clear legislative intent to alter pre-Code practice, Judge Hutchinson could not conclude "that Congress intended such a far reaching intrusion on the states' administration of their criminal justice system as the majority's result entails." Id.

The Court granted certiorari.

SUMMARY OF ARGUMENT

Criminal restitution orders are not "debts" within the meaning of the Bankruptcy Code because state law affords no "right to payment" to either the victim or the court system. Although the victim is incidentally benefitted, the goal of restitution is not repayment of money, but enforcement of state criminal laws and rehabilitation of criminal defendants. Neither the victim nor the court system stands in the shoes of a civil creditor with attendant civil remedies for debt collection.

As a matter of federal law and statutory construction, criminal restitution orders are not "debts" because Congress has not clearly expressed an

intention that they be considered "debts." When, as here, a proposed interpretation of the Bankruptcy Code would alter pre-Code law and affect state and federal interests of great importance, the Court has required indications of Congressional intent to support the proposed interpretation with unmistakeable clarity. Neither the language of the Code, nor its legislative history, clearly indicates that Congress intended, by enacting the Code, to make criminal judgments "debts."

ARGUMENT

A CRIMINAL RESTITUTION ORDER IS NOT A DEBT ENCOMPASSED BY THE BANKRUPTCY CODE.

The issue reserved in Kelly, whether criminal restitution orders are "debts", is of enormous importance to the states' administration of criminal justice. Restitution is permitted as a sentencing option in all states (Petition, p. 26). If restitution orders are "debts," the Commonwealth of Pennsylvania alone will be unable to enforce the more than 5,000 criminal sentences of restitution entered each year, in the event the individuals sentenced choose to file bankruptcy petitions. (Petition pp. 26-27). The Court in Kelly recognized that such a holding would lead to the "unseemly" result of requiring state prosecutors to

submit the judgments of their criminal courts to federal bankruptcy courts, could lead to "federal remission of judgments imposed by state criminal judges," and in turn would "hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." 479 U.S. at 48-49. Limiting the flexibility of sentencing options available to judges short of incarceration can only exacerbate current problems of prison overcrowding. As demonstrated below, the result the Court of Appeals reached in this case is not only "unseemly," but inconsistent with the language, history, and purpose of the Bankruptcy Code.

A. A Criminal Restitution Order is Not a "Right to Payment" and Therefore Not a "Debt" Within the Meaning of the Bankruptcy Code.

The Code defines a "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(4)(A).[5] The petitioners submit that in Pennsylvania, neither the

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[5]The Code also defines "claim" in equitable terms as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;" 11 U.S.C. § 101(4)(B).

victim of a crime nor the Probation Department possesses a "right to payment" of a restitution order, and that such order therefore is not a "debt" within the meaning of the Bankruptcy Code. The discharge provisions of § 727 and § 1328 operate only to discharge "any debt." Thus, whatever may be the nature of a criminal's obligation to make restitution, if it is not a "debt," the bankruptcy court has no authority to discharge it.

1. Whether a "right to payment" exists is a question of state law, In re Frenville, 744 F.2d 332, 337 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985), but as a general matter it is clear that the purposes of criminal restitution are quite distinct from those of compensation for loss. In

Kelly the Court observed that the context in which a criminal restitution order is imposed undermines the conclusion that it is a judgment for the benefit of the victims. 479 U.S. at 35. The Court observed that the victim has no control over the decision to order restitution or the determination of the amount and that this decision generally turns not on the victim's injury, but on the penal goals of the state and the situation of the defendant.

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Id., quoting In re Pellegrino, 42 B.R. 129, 133 (Bankr. D. Conn. 1984). Thus, the focus is not on the debtor/creditor relationship or the collection of a debt, but rather on state penological goals.

The Pennsylvania law governing restitution is similar to the Connecticut law analyzed in Kelly and supports the conclusion that neither the victim nor the Probation Department has a right to payment. When a criminal defendant is convicted of a crime involving theft, conversion or decreasing the value of property, or involving personal injury, the court may impose restitution either as a part of the sentence or as a condition of probation or parole. 18 Pa. Cons. Stat. Ann. § 1106(a)-(c) (Purdon 1983). In the case of welfare

fraud, such restitution is mandatory. Pa. Stat. Ann., tit. 62, § 481 (Purdon Supp. 1989).[6] But cf. Id. at § 1106(c)(1).[7]

Like the Court in Kelly, Pennsylvania Courts recognize that an order of restitution does not amount to an award of damages and that, in fixing

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[6]The statute provides that "any person committing a crime enumerated... shall be ordered to pay restitution of any moneys he has received by reason of any false statement...." The statute permits payment by lump sum, monthly installment, or by any other schedule deemed just by the sentencing court. The time period for making the restitution is not limited by the statute. Ibid.

[7]Notwithstanding the mandatory language of Pa. Stat. Ann. tit. 62, § 481 (Purdon Supp. 1989), there is some authority to suggest that a court must still take the financial resources of the defendant into consideration. See, e.g., Commonwealth of Pennsylvania v. Melnyk, 378 Pa. Super. Ct. 42, 548 A.2d 266 (1988), appeal denied, ___ Pa. ___, 562 A.2d 319 (1989). But see Commonwealth v. Ferguson, ___ Pa. Super. Ct. ___, 552 A.2d 1075 (1988).

its amount, concern that a victim be fully compensated should not overshadow the primary purpose of rehabilitating the criminal defendant. Commonwealth v. Fuqua, 267 Pa. Super. Ct. 504, 407 A.2d 24, 26 (1979). Thus, although the amount of restitution is limited to the injury sustained by the victim, restitution need not be in that amount; and the court is free to consider, in addition to the extent of injury, "other such matters as it deems appropriate." For one thing, the amount imposed must not exceed the defendant's ability to pay. Commonwealth v. Reed, 374 Pa. Super. Ct. 510, 543 A.2d 587 (1988). Further, the court retains the authority to alter or amend any order of restitution. 18 Pa. Cons. Stat. Ann. § 1106(c) (3)(Purdon 1983).

The criminal defendant makes payment directly to the Probation Department, which passes the payments on to the victim. A restitution order, however, is not the equivalent of a civil damage award; if the criminal defendant fails to make restitution as ordered, the victim has no right of enforcement. Commonwealth v. Mourar, 349 Pa. Super. Ct. 583, 504 A.2d 197 (1986), vacated on other grounds, 517 Pa. 83, 534 A.2d 1050 (1988). Nor does the existence of a restitution order preclude the victim from bringing a civil damages action against the criminal, a right which the restitution statute expressly reserves. 18 Pa. Cons. Stat. Ann. § 1106(g)(Purdon 1982). In Pennsylvania, a victim thus has no "right to payment" of a restitution order.

The Court of Appeals, however, found such a "right to payment" as to the Probation Department, remarking that "there can be no greater enforcement mechanism than the threat of revocation of probation and the threat of incarceration." Pet. App. 25a. In fact, the enforcement capability of the court is rather limited, at least insofar as actual recovery of money or property is concerned. If an offender fails to make restitution, the Probation Department notifies the court and the court orders a hearing to determine whether the defendant is in contempt of court or has violated his probation or parole. § 1106(f). The criminal court first determines whether payment has been made. If it has not, the court considers

at a second hearing whether nonpayment constitutes a violation of probation.[8] Of particular relevance to the right to payment issue, this Court has held in Bearden v. Georgia, 461 U.S. 660 (1983), that a state court cannot constitutionally revoke probation for failure to pay a fine and make restitution without first determining the probationer's ability to pay. Thus, even given a defendant's failure to make restitution, he may not be incarcerated if he lacks the ability to pay. Accord, Commonwealth ex rel. Parrish v. Cliff, 451 Pa. 427, 304 A.2d 158 (1973)(order of incarceration reversed where no ability to pay shown).

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[8]This Court held in Gagnon v. Scarpelli, 411 U.S. 778 (1973), that due process requires preliminary and final revocation of probation hearings.

Futhermore, although in a proper case the court can impose criminal sanctions, neither it nor its probation officers have available civil aids to the recovery of a judgment, such as attachment, levy, or lien.[9]

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[9]The General Assembly of Pennsylvania has authorized seizure or forfeiture of property in a number of specific instances, none of which could be applied to permit seizure of property of criminal defendants for nonpayment of restitution by the Probation Department. For instance, the Controlled Substances Forfeiture Act, 42 Pa. Cons. Stat. Ann. §§ 6801-6802 (Purdon Supp. 1989), contains an extensive forfeiture section covering everything from drug paraphernalia and cars used to transport drugs to proceeds traceable to drug transactions. Id. Gambling devices can be seized pursuant to 18 Pa. Cons. Stat. Ann. § 5513 (Purdon 1983). Property illegally possessed or used in violation of the Liquor Code is subject to forfeiture. Pa. Stat. Ann. tit. 47, § 6-601 (Purdon Supp. 1989).

The Probation Department also lacks the power to attach a criminal defendant's wages.[10] Personal earnings are generally exempt from process in Pennsylvania pursuant to 42 Pa. Cons. Stat. Ann. § 8127 (Purdon Supp. 1988), but may be attached for support, board, or a student loan. Id. It is significant that the domestic relations section[11] can effectuate a wage attachment without further court action once a

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[10]Cf. 42 Pa. Cons. Stat. Ann. §§ 9724 and 9755 (Purdon 1982), which provides that under a sentence of partial confinement the prison superintendent "shall collect the same [the wages earned by the defendant] or shall require the defendant to turn over his wages of salary in full when received...." Id. at § 9755(f)(emphasis added).

[11]The employees of domestic relations sections are staff of the court just as probation officers are. 42 Pa. Cons. Stat. Ann. § 961 (Purdon 1981).

defendant is one month in arrears, 23 Pa. Cons. Stat. Ann. § 4348 (Purdon Supp. 1989), while probation officers have no such authority. Thus, there is no right to payment which is enforceable as might be expected in the normal course of a debtor/creditor relationship. Neither the victim nor the court system stands in the shoes of a civil creditor, with attendant remedies. Federal courts have frequently recognized that a criminal restitution order does not establish a debtor/creditor relationship, and have concluded that a restitution order is not a debt. See note 2, infra.

2. This case is therefore different from cases like Ohio v. Kovacs, 469 U.S. 274 (1985). In Kovacs, a debtor failed to clean up a hazardous waste site as required by an injunction

and a state statute. The State of Ohio appointed a receiver to take control of his assets to recover money to defray cleanup costs. The Court found that under these circumstances statutory obligations did give rise to a right to payment under the Bankruptcy Code. 469 U.S. at 279.[12] The focus in Kovacs, however, was on the recovery of money. Id. at 282-283. The focus here is on enforcement of criminal laws and the rehabilitation of criminal offenders. None of the steps taken in Kovacs to insure repayment have been or could have been taken in this case.

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[12]The Court was careful to point out that its holding did not imply that a discharge would shield the debtor from criminal prosecution or from criminal contempt for failing to obey the injunction. 469 U.S. at 284. The Court also observed that had a fine or monetary penalty been imposed, it would have been nondischargeable pursuant to 11 U.S.C. § 523(a)(7).

A criminal restitution order should not be considered a "debt" because there is no "right to payment" under state law. Under federal law, it is not a "debt" because Congress has not demonstrated a clear intent that criminal judgments be included within the scope of the Bankruptcy Code.

B. Congress Has Not Expressed a Clear Intent to Depart from Pre-Code Law.

A criminal restitution order should not be considered a "debt" under the Bankruptcy Code because pre-Code law did not recognize criminal orders as debts, because Congress did not clearly express an intent to depart from prior law, and because the departure from prior law would have a significant impact on the most important areas of state sovereignty.

1. The Court, and Congress itself, have often required that Congress speak with exceptional clarity when it wishes to infringe on the prerogatives of the States. See, e.g., Dellmuth v. Muth, No. 87-1855, slip op. (U.S. June 15, 1989) (Eleventh Amendment abrogation); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) (conditions for receiving federal funds); 28 U.S.C. § 2283 (courts not to enjoin state courts unless expressly authorized). This clarity of expression ensures that the usual constitutional balance between the States and the federal government will be disturbed only when Congres has directly focused its attention on the matter and has explicitly decided in favor of such a change. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985).

Thus, in construing the Bankruptcy Code, the Court has repeatedly refused to find that the Code altered pre-Code law to the detriment of important state interests, without clear signs that Congress intended this result. Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986); and U.S. v. Ron Pair Enterprises, Inc., No. 87-1043, slip op. (U.S. Feb. 22, 1989). In Midlantic, for example, the Court refused to find that the Code had implicitly repealed a pre-Code exception to a bankruptcy trustee's abandonment powers created by the courts out of deference to state health and safety regulations, an interest which the Court in Kelly judged "comparable" to the state

interest in administration of its criminal laws. 479 U.S. at 47.[13] The Court stated that "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept it makes that intent specific."[14] Midlantic, 474 U.S. at 501. The Court has followed this

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[13]In holding that criminal restitution orders were not dischargeable in Chapter 7 bankruptcies, the Court observed that criminal fines and penalties were not considered dischargeable under the 1878 Act, the Code's predecessor, and recognized in this judicial exception "a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." 479 U.S. at 47.

[14]In Ron Pair, the court noted that the outcome sought in Midlantic would result in not only a departure from pre-Code law but in an extraordinary exemption from non-bankruptcy law thus requiring some "clearer expression of congressional intent." Id., Slip op. at 8.

rule with particular care in construing the scope of bankruptcy codifications, 474 U.S. at 501. The Court in Midlantic, by way of comparison, quoted Palmer v. Massachusetts, 308 U.S. 79, 85 (1939): "If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change." Id. at 501.

The "clear intent" rule as articulated in Midlantic and Kelly applies when the statutory language in question is at least in some degree open to question, represents a departure from pre-Code practice, and, under the proposed interpretation, is in clear conflict with state or federal laws of

great importance. Ron Pair, slip op. at 9-10. The rule of interpretation applies in this case.

2. There can be no question that the Court of Appeals' decision in this case is a drastic departure from pre-Code practice and that it intrudes upon the States' important interest in administering their criminal laws.

The Court in Kelly recognized that "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity." 477 U.S. at 46; Ron Pair, slip op. at 9,

n.8.[15] It cannot seriously be questioned that the Court of Appeals departure from pre-Code practice has a significant and direct impact on a central area of state sovereignty -- administration of criminal laws -- again, recognized by the Court in Kelly:

> Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the state.

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[15]Although the actual language of the 1898 Bankruptcy Act suggests that penalties owing to the United States or to states were "debts", many courts interpreting the Act had held or stated that criminal fines and penalties were in fact not "debts." See Zwick v. Freeman, 373 F.2d 110, 116 (2d Cir.), cert. denied, 389 U.S. 835 (1967); Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946); In re Abramson, 210 F. 878, 880 (2d Cir. 1914); In re Moore, 111 F. 145, 149-50 (W.D.Ky. 1901).

479 U.S. at 47. In Ron Pair, the Court emphasized that "[i]n Kelly as in Midlantic, pre-Code practice was significant because it reflected policy considerations of great longevity and importance." Slip op. at 9. Thus, the Court should not conclude that Congress has in the Code altered the prior law with respect to criminal sanctions unless it has expressed an intent to do so with unmistakeable clarity.

3. The broad definitions of "debt" and "claim" are insufficient to alter pre-Code law because nowhere in the Code's language or in its legislative history does Congress demonstrate a clear intent that criminal sanctions, including restitution orders, were meant to be embraced within the scope of "debts" under the Bankruptcy Code. Although the language of § 101(4) and

(11), which defines "debts" and "claims," is admittedly broad, breadth of language alone, without some further specific evidence of legislative intent, is not sufficient to work a change in prior bankruptcy law where important state and federal interests are affected. The language of § 101(4) is no more broad than that which the Court found insufficient to alter pre-Code law in Midlantic. In that case, the Court analyzed Code provisions which authorized a bankruptcy trustee to abandon property. The statutory language was quite broad, and was termed by the dissent "absolute in its terms" 474 U.S. at 509 (Rehnquist, J., dissenting):

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

11 U.S.C. § 554(a) (amended 1984).

Despite the breadth of this language, the Court refused to find that Congress had implicitly abrogated a pre-Code limitation on abandonment powers which the courts had created out of a deference to legitimate state and federal interests -- in the case of Midlantic, state environmental concerns that Congress shared. 474 U.S. at 506.[16]

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[16]In the course of reaching this decision, the Court explicitly rejected a rationale posited by the Third Circuit in this case: that Congress' inclusion of specific exceptions to the automatic stay provision of § 362 for criminal proceedings suggests, by its failure to include similar exceptions to the definition of debt, that Congress intended that criminal judgments be included within its scope. Pet. App. 34a. The Court noted that, while the

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Furthermore, in Kelly the Court acknowledged that the Code's definition of "debt" is broadly drafted and that the Code's legislative history, as well as its priority and dischargeability provisions, support a broad reading. Yet the Court still observed that

> [n]othing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

judicial exceptions to the trustees' abandonment powers were firmly established by 1978, Congress in the Code was broadening the scope of the automatic stay and hence had to limit the new power expressly. 474 U.S. at 504. This case is the same. The exceptions for criminal orders were firmly in place when the Code was enacted. Kelly, 479 U.S. at 46.

479 U.S. at 50, n. 12. In fact, the problems and concerns which Congress expressed as being addressed in the new Code have nothing to do with discharging criminal judgments. The Senate Report defines the general purpose of the reform as a modernization designed to address changes in the law of debtor-creditor relations, including adoption of the Uniform Commercial Code and the spread of consumer credit, S. Rep. No. 989, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5788. The House identified the same developments as prompting the need for modernization, and identified as other problems the need for overhaul of the bankruptcy court system and the inadequacy of relief under the Bankruptcy Act available

to consumer debtors. H.Rep.No. 595, 95th Cong., 2d Sess. 3-5, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 5965-5966.[17]

There is nothing in the legislative history of the Code to demonstrate that, by enacting it, Congress knew it

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[17]The discussion concerning Chapter 13 similarly does not express an intent to alter the law with respect to criminal sanctions. The Senate Report identifies five problems with respect to this section of the Act: limitations on eligibility of individuals with regular income; limitations on hardship discharges; erratic treatment of secured creditors; problems with accomodation co-debtors in consumer finance; and problems with formal creditor voting. S.Rep No. 989, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5799. The House Report is somewhat less sanguine, but nowhere does it identify treatment of criminal sanctions under the Act as a problem to be remedied under Chapter 13 of the Code. H.R.Rep. No. 595, 95th Cong., 2d Sess. 118-125, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6079-6086.

was making criminal judgments "debts" potentially dischargeable in bankruptcy. To the contrary, there is the clear expression of intent that "[t]he bankruptcy laws are not a haven for criminal offenders." H.R. Rep. No. 595, 95th Cong., 2d sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 6299.

4. Further, it is not permissible to infer, as did the Court of Appeals, that by enacting the exception to discharge contained in § 523(a)(7) and by failing to incorporate that exception in the discharge provisions of § 1328(a), Congress established by implication that a criminal judgment is a "debt" and that it is dischargeable in Chapter 13 bankruptcies. The statutory language is not definitive, the legislative history is unrevealing, and

the Court has refused to find abrogation of pre-Code law by implication. Section 523(a) excepts from discharge "debts":

> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --
>
> (A) relating to a tax of a kind specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

First, the statutory language does not definitively resolve whether criminal penalties are "debts." Like only two other exceptions to discharge encountered in § 523(a), it uses the language "to the extent such debt is for ..." See also 11 U.S.C. § 523(a)(5)(A),

523(a)(9). It thus leaves entirely open whether a penalty such as criminal restitution is to any extent a "debt."

Second, the Court has required greater clarity of intent than the mere implication that, by enacting the exception, Congress acknowledged that criminal judgments were "debts." In Midlantic and in Kelly, the Court has expressed its unwillingness to countenance implicit or "silent abrogation" of judicial concepts engrafted into pre-Code practice which affect important state or federal interests. Kelly, 479 U.S. at 36.

Finally, the legislative history of § 523(a)(7) does not support a departure from pre-Code treatment of criminal sanctions. The absence of legislative history may be considered in

a case such as this. Kelly, 479 U.S. at 50-51. Pointing to the absence of relevant legislative history to support a conclusion that Congress intended a discharge in bankruptcy to void criminal restitution orders, the Court in Kelly observed that "[i]f Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage." Id. at 51, quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting).

There is no such testimony or debate. In fact, although in Kelly this Court found § 523(a)(7) a codification of the judicially created exception to discharge for criminal fines, one could

as easily conclude from an examination of the remainder of § 523(a)(7) and the pertinent discussion of the Senate Judiciary Committee Report on the then proposed Bankruptcy Code, both of which discuss tax-related matters, that Congress in enacting § 523(a)(7) intended to address the status of civil tax penalties, not criminal sanctions.[18]

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[18]The Senate Report provides: "Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523 (a)(7)). These latter liabilities cover those which, [sic] but are penal in nature, as distinct from so-called 'pecuniary loss' penalties which, in the case of taxes, involve basically the collection of a tax under the label of a 'penalty.' This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision

(FOOTNOTE CONTINUED ON NEXT PAGE)

Thus, the legislative history lends no support to the conclusion that by enacting the exception Congress intended to recognize criminal judgments as "debts."

Taken together, neither the language of the Code nor its legislative history evidence, with the unmistakeable clarity the Court has required, that Congress intended to alter pre-Code law and intrude on so fundamental a matter of state sovereignty as the administration of criminal law.

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reflects the existing position of the Internal Revenue Code [Title 26] (Rev. Rul. 68-574, 1968-2 C.B. 595)." S. Rep.No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5865. Although the paragraph seems to be missing a line, the Report clearly reveals the Senate Judiciary Committee's intention that § 523(a)(7) address the dischargeability of civil tax penalties such as those authorized in 26 U.S.C. §6651 et. seq. Thus construed, §523(a)(7) focuses on an issue that had generated much litigation and uncertainty under the 1898 Bankruptcy Act. See 3 Collier on Bankruptcy ¶57.22[2], [2.1] (14th ed. 1977).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners,

v.

EDWARD J. & DEBORA A. HUNTSTONE
Respondents.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

BRIEF OF THE RESPONDENTS

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QUESTION PRESENTED

In enacting the Bankruptcy Code's comprehensive system for the fair and equitable adjustment of a debtor's financial obligations, did Congress intend to permit chapter 13 debtors to provide for and, in some cases, discharge state criminal restitution payment obligations pursuant to 11 U.S.C. § 1328(a)?

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STATUTES INVOLVED

This case primarily involves 11 U.S.C. § 101(4), (11), concerning the definition of "claim" and "debt"; 11 U.S.C. § 523(a), concerning exceptions to discharge in chapter 7 bankruptcy cases; and 11 U.S.C. § 1328, concerning discharge in chapter 13 cases. Also involved are Pennsylvania's laws on welfare fraud, Pa. Stat. Ann. tit. 62, § 481 (Purdon 1968 & Supp. 1989); and restitution, 18 Pa. Cons. Stat. Ann. § 1106 (Purdon 1983). These statutes are set forth verbatim in the Petition for a Writ of Certiorari.

Respondents will also refer to the Supremacy Clause; 11 U.S.C. § 362, concerning the automatic stay; 11 U.S.C. § 726, concerning distribution of property of the estate; and 18 U.S.C. § 3613, concerning dischargeability of federal fines. These statutes are set forth verbatim in the Appendix to Brief of the Respondents.

STATEMENT OF THE CASE

The facts of this case are not in dispute. From September, 1984 to April, 1985, respondents Edward J. and Debora A. Davenport received public assistance and food stamps while receiving sporadic disability benefits. Petitioner Pennsylvania Department of Public Welfare (DPW) determined that Mr. & Mrs. Davenport had received overpayments of public assistance and a criminal prosecution was initiated in the Bucks County (Pennsylvania) Court of Common Pleas. J.A. 56a-69a; 3d Cir. App. 47a-49a.

On September 17, 1986, the Davenports pleaded guilty to making false statements in order to secure the public assistance and food stamps. J.A. 70a, 72a. They were sentenced to one year probation and ordered to make full restitution, as mandated by Pennsylvania law. Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989).

Several months later, the Davenports received a letter from petitioner Adult Probation and Parole Department of the Court of Common Pleas of Bucks County (Probation Depart-

ment). This letter instructed the Davenports to commence paying the restitution at a total rate of $416 per month beginning December 1986, and continuing until they had remitted a total of $4,144.80. J.A. 32a. At the time they filed their chapter 13 statement in the bankruptcy court, the Davenport's total gross monthly income was $1,064 and their necessary expenses (food, clothing and shelter) were $1,037. J.A. 17a.[1] Under Pennsylvania law, the Probation Department was required to forward the payments to DPW. 18 Pa. Cons. Stat. Ann. § 1106(e) (Purdon 1983).

On May 15, 1987, the Davenports filed a petition under chapter 13 of the Bankruptcy Code. The restitution obligation was listed in their chapter 13 statement as an unsecured debt payable to DPW. J.A. 18a. In addition, the Probation Department was given notice of the bankruptcy by letter on July 20, 1987. J.A. 37a.

The debtors' chapter 13 plan, J.A. 20a, provided that DPW would receive treatment equal to the other unsecured creditors.[2] Neither DPW nor the Probation Department filed a proof of claim in the bankruptcy case. On October 20, 1987, there being no objection from any creditor, the bankruptcy court, upon the trustee's recommendation, confirmed the debtors' plan. J.A. 2a. No appeal was taken from the confirmation

[1] The record does not reflect the amount of the Davenports' income at the time of sentencing in September 1986. However, it was apparently the Probation Department that set the monthly payment amount (J.A. 32a; 3d Cir. App. 49a, 63a-66a), not the court, despite the fact that Pennsylvania law requires this to be a judicial decision. *See Commonwealth* v. *Valent*, 317 Pa. Super. 145, 463 A.2d 1127 (1983); *Commonwealth* v. *Wood*, 300 Pa. Super. 463, 446 A.2d 948 (1982). It does not appear that any factual determinations were made by any entity regarding the Davenports' ability to pay before the restitution payment schedule was imposed.

[2] The assertion at p. 2 of the brief filed by amicus Washington Legal Foundation that the plan provided for no payments to DPW and other unsecured creditors is incorrect.

order. The Davenports eventually successfully completed their plan and received a discharge under 11 U.S.C. § 1328(a) on July 8, 1988. J.A. 3a.[3]

When the debtors failed to make restitution payments as instructed by the Probation Department, that entity commenced a probation violation proceeding in July, 1987. J.A. 34a. The Davenports notified the Probation Department of the pending bankruptcy proceeding and requested withdrawal of the probation violation charges. J.A. 37a. The Probation Department refused, and the debtors commenced an adversary proceeding in bankruptcy court seeking a declaration that the restitution was a dischargeable debt. J.A. 26a. A hearing in the adversary proceeding was held on October 26, 1987, 3d Cir. App. 41a-161a, and the bankruptcy court took the case under advisement. On October 29, 1987, the Probation Department proceeded with a violation of probation hearing in Bucks County. 3d Cir. App. 162a-178a. The Court of Common Pleas denied the motion to revoke probation. 3d Cir. App. 178a.

The bankruptcy court issued its decision on March 8, 1988, ruling that the restitution obligation was dischargeable under 11 U.S.C. § 1328(a). *In re Davenport*, 83 B.R. 309 (Bankr. E.D. Pa. 1988). On appeal, the district court reversed, holding that the restitution obligation was not a debt as defined by the Bankruptcy Code and that a discharge would violate principles of federalism. *Davenport* v. *Pennsylvania*, 89 B.R. 428 (E.D. Pa. 1988).

On appeal by the Davenports, the United States Court of Appeals for the Third Circuit reversed. *In re Johnson-Allen*, 871 F.2d 421 (3d Cir. 1989). The court of appeals ruled that a criminal restitution obligation is a debt as defined by the Bankruptcy Code because it is a "right to payment," 11 U.S.C. § 101(4), (11), a term of sufficient breadth to include a restitution obligation as to which any person has a right to payment,

[3] Because petitioners filed no proof of claim, the chapter 13 trustee made no distributions to the petitioners under the confirmed plan.

and that the debt is dischargeable in chapter 13 bankruptcy cases pursuant to 11 U.S.C. § 1328(a).

SUMMARY OF ARGUMENT

The order of restitution entered by the Court of Common Pleas of Bucks County required respondents to make monthly payments to the Probation Department as a condition of probation. That court-ordered payment obligation imposed a "debt" on respondents and created, on behalf of petitioners, a right to payment, or "claim," under the Bankruptcy Code.

Under the plain language of the Code, consistent with the relevant legislative history, restitution is included in the broad definition of "debt" or "claim." Congress specifically codified a pre-Code judicial exception to discharge for restitution in chapter 7 cases, and did not carry over that exception to some chapter 13 cases. Restitution would not have to be excepted from discharge under chapter 7 had Congress not considered restitution a debt in the first instance. Congressional intent to include restitution in the definition of claim is also gleaned from the Code provisions regarding distribution, 11 U.S.C. § 726, and the automatic stay, 11 U.S.C. § 362, as well as recent amendments to the federal criminal code which specifically excepted federal fines from discharge.

Classifying restitution as a claim is necessary to effectuate the policies underlying chapter 13. Congress intended chapter 13 to be an attractive alternative to the straight liquidation of chapter 7. By allowing chapter 13 debtors to adjust all their financial obligations, Congress accomplished the two fundamental purposes of bankruptcy: the equal treatment of creditors and a fresh start for debtors. Placing restitution outside bankruptcy would frustrate the full effectiveness of chapter 13 because it would provide petitioners more favorable treatment than that accorded other creditors, including other creditors owed debts that are nondischargeable under chapter 7. In addition, a debtor's ability to formulate a feasible plan to deal with all his debts would be unduly hampered.

Debtors here do not seek to invoke the equitable power of a federal court to enjoin a state court proceeding. Instead, debtors seek a judicial declaration whether restitution is a debt under the Code.

A declaration that restitution is a debt will not trigger a great increase of chapter 13 filings. The power of a bankruptcy court to deny confirmation if a plan is not filed in good faith, the creditors' right to require the debtor to commit all disposable income to the plan, and the very modest statutory exemptions available to debtors combine to prevent abuse of the bankruptcy process. Any individual who has the ability to pay restitution can expect no advantage by filing bankruptcy under chapter 13.

In the final analysis, the Constitution gives Congress, not the states, the power to define the scope of dischargeability in bankruptcy. To the extent state law conflicts with federal law, the latter controls. Allowing creditors to avail themselves of state criminal proceedings to collect debts is in direct contravention of Congress' intent to allow a chapter 13 debtor to provide in his plan of reorganization for all obligations giving rise to a right to payment.

ARGUMENT

I. A CRIMINAL RESTITUTION OBLIGATION IS A DEBT WITHIN THE MEANING OF THE BANKRUPTCY CODE

A. Introduction

In *Kelly* v. *Robinson*, 479 U.S. 36 (1986), this Court held that a restitution obligation imposed as a condition of probation in state criminal proceedings is not dischargeable in a chapter 7 bankruptcy case. Specifically, the Court held that the obligations are rendered nondischargeable by 11 U.S.C. § 523(a)(7), which bars the discharge of a debt in a chapter 7 case "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." *Kelly*, 479 U.S. at 52. The

Court's holding in *Kelly* also rendered restitution obligations nondischargeable in all chapter 12 cases as well as many chapter 11 and chapter 13 cases. *See* 11 U.S.C. § 1141(d)(2), (3); *id.* § 1228(a)(2); *id.* § 1328(b).

The Court's decision in *Kelly* was grounded on its construction of § 523(a)(7). That provision was enacted "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders." *Kelly*, 479 U.S. at 46. Concluding that the language of § 523(a)(7) is "subject to interpretation," *Kelly*, 479 U.S. at 50, and finding no evidence in the legislative history that Congress intended to change pre-Code law, the Court held that § 523(a)(7) "codifies the judicially created exception to discharge for fines." *Kelly*, 479 U.S. at 51. The Court further found that the qualifying language of § 523(a)(7), which states that a fine, penalty, or forfeiture is nondischargeable only if it is "payable to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss" did not apply to restitution obligations. The Court held that the state's rehabilitation and penal interests served by restitution are sufficient to place restitution obligations within the scope of § 523(a)(7).

In this case, unlike in *Kelly*, the focus of the inquiry is not whether restitution is "compensation for actual pecuniary loss" within the meaning of § 523(a)(7), but rather, more fundamentally, the scope of the terms "debt" and "claim" under the Code. *See* 11 U.S.C. § 101(4), (11). In *Kelly*, the Court reserved judgment on the issue whether the terms "debt" and "claim," which are defined expansively in the Code, encompass a debtor's obligation to make restitution payments. *Kelly*, 479 U.S. at 50.

If a restitution obligation is held to be a "debt" cognizable in bankruptcy, there can be no doubt that it is dischargeable in some chapter 13 cases. Sections 1328(a) and (b) provide for two types of discharges in chapter 13 cases. The first kind of discharge, provided by § 1328(a) for debtors who complete their plan payments, is broader than the discharge provided under chapter 7. Section 523(a) excepts ten categories of debt from

discharge under chapter 7. Section 1328(a) incorporates only one of those categories, debts "of the kind specified in section 523(a)(5),"[4] in its list of debts excepted from discharge under chapter 13. Congress' adoption in § 1328(a) of only one of the § 523(a) exceptions makes it clear that the other nine types of debts identified as nondischargeable under § 523(a) are dischargeable under § 1328(a).[5] The second type of chapter 13 discharge, the "hardship" discharge provided by § 1328(b), when a debtor cannot complete his plan payments, does not discharge any of the kinds of debts listed in § 523(a).[6]

As explained more fully below, Congress' intent to define restitution as a debt under the Code is directly discernible not only from the plain language of the statute itself but from other sources, including the legislative history of the definitional provisions of the Code, the enactment of § 523(a)(7) against the background of the pre-Code judicial decisions excepting restitution from discharge, and the enactment of other recent legislation. Moreover, the conclusion that restitution is a dischargeable debt is in harmony with other Code provisions and the statutory scheme as a whole.

B. The Plain Language of § 101 And Its Legislative History Establish Congress' Intent To Alter Pre-Code Law And To Broaden Substantially The Scope Of The Term "Debt"

1. The Plain Language Of § 101(4) Encompasses Restitution Obligations

As in all cases of statutory interpretation, the starting point in this case must be the statutory language itself. *United States*

[4] Section 523(a)(5) refers to certain debts for "alimony," "maintenance" or "support" of a spouse, former spouse or a child of the debtor.

[5] Respondents do not understand petitioners or their supporting amici to argue otherwise.

[6] Under § 1328(b), a court may grant a discharge to a chapter 13 debtor who has not made all of the payments required by the confirmed chapter 13 plan if, *inter alia*, such failure "is due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b).

v. *Ron Pair Enters., Inc.*, 109 S.Ct. 1026, 1030 (1989); *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." *Immigration and Naturalization Servs.* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Where the terms of a statute are unambiguous, only the "most extraordinary showing of contrary intentions" from the legislative history would justify limiting the statute's plain language. *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).[7] As long as the framework of the Code is coherent and consistent, there is generally no need to look beyond the plain language. *Ron Pair*, 109 S.Ct. at 1030.

The Code defines a debt as "liability on a claim." 11 U.S.C. § 101(11). "Claim," in turn, is defined as a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

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[7] Many of the arguments raised by petitioners and supporting amici focus on what they consider to be negative policy ramifications of the court of appeals' ruling in this case. However, this Court has recently cautioned against ignoring the plain language of a statute on such grounds:

> [W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Mansell v. *Mansell*, 109 S.Ct. 2023, 2031 (1989).

11 U.S.C. § 101(4).[8]

The court of appeals properly focused its inquiry on the question whether a restitution obligation gives rise to a "right to payment" under Pennsylvania law. *See, e.g., In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir. 1988) (existence of claim is determined by reference to rights created by state law or, where applicable, federal law (*citing Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156 (1946))).

The Pennsylvania statute under which the Davenports were prosecuted mandates the payment of restitution in the following terms:

> Any person committing a crime enumerated in subsection (a) *shall be ordered to pay restitution of any moneys* he has received by reason of any false statement, misrepresentation, impersonation, failure to disclose required information or fraudulent means.

Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989) (emphasis added). The applicable Pennsylvania statute defines restitution as "[t]he return of the property of the victim or *payments in cash or the equivalent thereof* pursuant to an order of the court." 18 Pa. Cons. Stat. Ann. § 1106(h) (Purdon 1983) (emphasis added). The court may order that restitution be paid in a lump sum or in monthly installments. 18 Pa. Cons. Stat. Ann. § 1106(c)(2) (Purdon 1983); Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989). Further, the beneficiary of a restitution order retains the supplemental right to seek a civil judgment for damages. Any such civil judgment must be reduced by any

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[8] The interplay between the definitions makes it clear that the term "debt" is to be construed equally broadly as the term "claim." "The terms 'debt' and 'claim' are coextensive: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." S. Rep. No. 989, 95th Cong., 2d Sess. 23 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 310 (1977).

amounts paid pursuant to the restitution order. 18 Pa. Cons. Stat. Ann. § 1106(g) (Purdon 1983).

The restitution debtor must make payments to the county probation department which then forwards the payments to the beneficiary-victim, in this case DPW. If the payments are not made, the restitution obligation may be enforced by the county probation department through contempt of court or probation violation proceedings in the Court of Common Pleas. 18 Pa. Cons. Stat. Ann. § 1106(f) (Purdon 1983).

Prior to their bankruptcy filing, the Davenports were subject to a court order directing them to pay money to the Probation Department for ultimate delivery to DPW. Certainly, a court order directing a person to pay a specified sum of money in specified monthly installments creates a "right to payment" under any plain, common meaning of the term. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *accord Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985); *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). This Court has also held that the term "right" should be given its "normal and customary meaning" and that it "connotes an ascertainable and legally enforceable power." *United States* v. *Byrum*, 408 U.S. 125, 136 (1972).

Moreover, Pennsylvania law explicitly recognizes that the restitution order and the restitution debtor's civil liability to the victim are different expressions of a single payment obligation. If it were otherwise, § 1106(g) would not require that any civil judgment be reduced by the amounts paid pursuant to the restitution order. 18 Pa. Cons. Stat. Ann. § 1106(g) (Purdon 1983). *Cf. In re Compton Corp.*, 40 B.R. 875 (Bankr. N.D. Tex. 1984) (involving penalties assessed by government for violation of oil price regulations in amounts measured by victim's pecuniary losses but not distributed to the victims by the government).

Petitioners argue that no right to payment exists because DPW cannot enforce the restitution order in its own name and the Probation Department, which does have enforcement powers, lacks civil collection remedies such as attachment, levy or lien. Petitioners' Brief at 27-31. Initially, it must be recognized that, outside of Pennsylvania, some restitution statutes do give the victim direct enforcement rights.[9] It is very unlikely that Congress would have distinguished restitution obligations based on whether victims have direct enforcement rights under state law, with the result that some restitution obligations would be bankruptcy "claims" and others would not. Certainly nothing in the Code or its legislative history suggests that Congress intended to draw such a distinction. Moreover, as the court of appeals recognized, nothing in the language of the Bankruptcy Code suggests that the right to payment must be enforceable by any particular entity. *In re Johnson-Allen*, 871 F.2d at 425. That the Probation Department collects the money on behalf of DPW in no way renders the obligation any less a right to payment.[10] Indeed, acceptance of petitioners' argument that an obligation not enforceable by its ultimate beneficiary is not a debt, would have far-reaching and obviously unintended ramifications. For example, any obligation to a trust (including most corporate bonded indebtedness) would necessarily be excluded from treatment in bankruptcy where the obligation can only be enforced by a trustee.

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[9] *See, e.g.*, 18 U.S.C. § 3663(h)(2); Ala. Code § 15-18-78(a)(Supp. 1989); Del. Code Ann. tit. 11, § 4101(b)(1987); Fla. Stat. Ann. § 775.089(5) (West Supp. 1989); Ga. Code Ann. § 17-14-13(b)(1982 & Supp. 1989); Idaho Code § 19-5305 (1987); Minn. Stat. Ann. § 611A.04 subd. 3 (West 1987 & Supp. 1990).

[10] On the other hand, if restitution is conceptualized as simply a penalty owed to the government, without consideration of the Probation Department's duty to forward payments to DPW, it is equally clear that the restitution order creates a right to payment in favor of the government.

Similarly, the Code does not in any way define claim in terms of the remedies available for enforcement of the right to payment. There is no question that an enforcement remedy exists under Pennsylvania law for an obligor's failure to comply with a restitution obligation (i.e., contempt or probation revocation proceedings). As the court of appeals observed: "Certainly there can be no greater enforcement mechanism than the threat of revocation of probation and the imposition of incarceration." *Id.* at 426.[11] It is immaterial that other potential remedies are not provided. The fact remains that the restitution debtor has a legally enforceable duty to pay money and the restitution creditor has the right to receive that money as well as pursue recovery in civil and sometimes criminal proceedings.

2. The Legislative History Reveals Congress' Intent To Define The Terms "Claim" And "Debt" Expansively

The broad definition employed by Congress in defining the term "claim" (and, therefore, the term "debt" as well) was deliberately expansive. Congress' intent to alter pre-Code definitional concepts and its awareness of the consequences of the definitions employed is well documented in the Senate and House Reports:

> Paragraph (4) defines "claim." The effect of the definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in

[11] Petitioners suggest that because a state may not be able to incarcerate a restitution debtor who lacks an ability to pay, *see Bearden* v. *Georgia*, 461 U.S. 660 (1983), the threat of incarceration is not a meaningful remedy. However, the efficacy of a remedy in a particular case is not the point so long as the remedy itself exists. Civil judgments entered against indigent persons who lack attachable income and property under state and federal exemption laws may also make it impossible as a practical matter for a creditor to collect a debt. That does not render the underlying obligation between the parties any less a right to payment.

> Section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters . . . *By this broadest possible definition*, and by the use of the term throughout the title 11, especially in subchapter I and chapter 5, *the bill contemplates that all legal obligations of the debtor*, no matter how remote or contingent, *will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.*

S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978) ("Senate Report") (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977) ("House Report") (emphasis added).[12]

Consistent with the Congressional intent evinced in the legislative history, many courts (including this Court), as well as commentators, have recognized in a variety of contexts the breadth of the Code's definition of "claim."[13] In *Ohio* v. *Kovacs*,

[12] Prior to Congress' consideration of the issue, the Commission on the Bankruptcy Laws of the United States recommended that the definition of claim be expanded and that the concept of provability be abandoned. *See* H.R. Doc. No. 93-137, pt. II, at 6, 101, 141 (1973). It is noteworthy that Congress *expanded* the Commission's proposed definition and expressed its intent to use the "broadest possible definition." *Compare id.* at 1 (definition of claim under § 1-102(9)) *with* 11 U.S.C. § 101(4).

[13] *See* 2 *Collier on Bankruptcy* ¶ 101.04 (15th ed. 1989); 3 *Norton Bankruptcy Law and Practice* § 76.02 (1981). Courts have consistently interpreted the scope of the term "claim" broadly. *See, e.g., In re Remington Rand Corp.*, 836 F.2d 825, 829 (3d Cir. 1988) ("all possible legal obligations"); *In re Robinson*, 776 F.2d 30, 36 (2d Cir. 1985) ("broadest possible"), *rev'd on other grounds*, 479 U.S. 36 (1986); *Kallen* v. *Litas*, 47 B.R. 977, 982 (N.D. Ill. 1985) ("broadest possible"); *In re Baldwin-United Corp.*, 48 B.R. 901, 903 (Bankr. S.D. Ohio 1985) ("all encompassing"); *In re Johns-Manville Corp.*, 36 B.R. 743, 754 n.6 (Bankr. S.D. N.Y. 1984) ("broadest possible"); *In re Smith Jones, Inc.*, 26 B.R. 289, 293 (Bankr. D. Minn. 1982) ("sufficiently broad to cover any possible obligation"); *In re Thomas*, 12 B.R. 432, 433 (Bankr. S.D. Iowa 1981) ("could not be broader").

469 U.S. 274, 279 (1985), this Court effectuated the broad construction of the term "claim" by holding that an obligation to clean up a hazardous waste disposal site fell within the definition of that term. The fact that the debtor's obligation arose from governmental legal action to enforce the law rather than from a breach of private contractual obligations did not preclude this Court's finding that it was a claim. The cleanup obligation was in essence a right to payment of money enforceable by the state and, therefore, the state had a claim against the debtor. *Id.* at 283.

Petitioners and amici argue that in the absence of some express statement in the Code or the legislative history, the Court cannot conclude that Congress intended the term "claim" to encompass restitution obligations. However, as the Court recently observed in *Ron Pair*, 109 S.Ct. at 1030, Congress worked on the formulation of the Bankruptcy Code for nearly a decade and ultimately implemented significant changes in both substantive and procedural law. "In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took." *Id.* The broad language of § 101(4) plainly covers the monetary payment obligation created by a restitution order and the legislative history demonstrates that the broad scope of § 101(4) was an intended change from prior law. To the extent any further analysis is necessary, Congress' intent can be gleaned from other statutory provisions as well as the statutory scheme as a whole.[14]

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[14] Congress' intent, clearly expressed in the legislative history, to depart from the restricted concept of "debt" under prior law and the consistency between a plain reading of 11 U.S.C. § 101(4) and other Code provisions distinguish this case from *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), and *Kelly*. In those cases, where this Court was construing § 554 and § 523(a)(7), respectively, the Court concluded that there was no evidence that Congress intended to depart from pre-Code concepts when it employed statutory language which was open to interpretation and which, if construed to give effect to its apparent plain meaning, would conflict with either other Code provisions or significant non-bankruptcy law. *Ron Pair*, 109 S.Ct. at 1032-33. Here, by comparison, the applicability of § 101(4)'s definition of "claim" as a "right to payment" to a restitution obligation is not open to interpretation and is derived from Congress' clearly expressed intent to alter and expand the scope of the term "claim" cognizable in bankruptcy. In addition, as discussed *infra*, the plain reading of § 101(4) is completely consistent with other Code provisions as well as Congress' expressed intent to expand the efficacy of the chapter 13 system. While there may be some tension between the plain meaning of § 101(4) and § 1328(a) and the Commonwealth's interest in administering its criminal justice system, " . . . Congress expressly chose to create [the] . . . tension. There is no reason to suspect that Congress did not mean what the language of the statute says." *Ron Pair*, 109 S.Ct. at 1033.

C. The Plain Language Of § 523(a)(7), The Pre-Code Background Against Which It Was Enacted And Other Recent Legislation All Demonstrate Congress' Intent To Include Restitution As A Debt Under The Code

1. Section 523(a)(7) Excepts From Discharge Monetary Obligations Which Commonly Arise Out Of Criminal Proceedings

In 11 U.S.C. § 523(a)(7), Congress excepted from discharge in all chapter 7 and chapter 12, and many chapter 11 and chapter 13 cases, any "debt" for a "fine, penalty, or forfeiture" payable to and for the benefit of a governmental unit and not as compensation for actual pecuniary loss. The plain language employed by Congress, the logical structure of this Code section, and this Court's decision in *Kelly*, establish that § 523(a)(7) was intended to apply to restitution obligations arising from criminal proceedings.

By referring to a "debt . . . for a fine, penalty, or forfeiture," Congress explicitly equated debts with the types of obligations which ordinarily do not arise between private parties but which routinely arise in governmental legal actions against its

citizens. In this respect, it is significant that at the time the Bankruptcy Code was enacted, the phrase, "fines, penalties, and forfeitures" was the title heading of chapter 229 in Title 18 of the U.S. Code relating to crimes and criminal procedure.[15] The use of the identical phrase in 11 U.S.C. § 523 (a)(7) evidences Congress' intent to include monetary sanctions arising from criminal proceedings within the scope of that section.

Moreover, the use of the term "fine" is new in the context of § 523(a); it did not appear in the prior Bankruptcy Act in the provisions dealing with discharge, provability or allowability. "Fine" has a well recognized criminal connotation. Nor is it the only term found in § 523(a) with a clear criminal connotation. Section 523(a)(4) also excepts from discharge "debts" for "embezzlement" or "larceny."

The exception from discharge of obligations normally associated with criminal proceedings demonstrates that Congress contemplated that they were debts under 11 U.S.C. § 101(4), (11). If such obligations were not debts, there would be no need to except them from discharge since only debts can be discharged. *Kelly*, 479 U.S. at 58 (Marshall, J., dissenting); *In re Erickson*, 104 B.R. 364, 367 (Bankr. D. Colo. 1989).

2. In Other Legislation, Congress Has Recognized That Criminal Monetary Obligations Can Be Subject To Discharge In Bankruptcy

The conclusion that criminal monetary obligations are debts that may be affected by a bankruptcy discharge is further buttressed by Congress' more recent enactment of 18 U.S.C. § 3613(f) in 1984.

Subchapter C of chapter 227 of the federal Crimes Code authorizes imposition of a fine as a sentence for a defendant

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[15] *See* former 18 U.S.C. §§ 3611 *et seq.* In 1984, Congress modified the title heading of chapter 229, shifted several of its previous provisions to chapter 232 and added several new statutory sections. *See* Pub. L. 98-473, title II, C. II, § 212(a) 98 Stat. 1987.

found guilty of a federal criminal offense. *See* 18 U.S.C. § 3551(b); *id.* § 3571—§ 3573. Subchapter B of chapter 229 provides for the collection of unpaid fines and various remedies if a defendant fails to pay. 18 U.S.C. §§ 3611 *et seq.* As part of subchapter B, § 3613(f) explicitly states: "[n]o discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine." 18 U.S.C. § 3613(f). The enactment of this express exception to discharge for federal criminal fines would have been completely unnecessary unless such obligations were debts subject to discharge in at least some bankruptcy cases.

Section 3613(f) also demonstrates that when Congress meant to except criminal monetary penalties from bankruptcy discharge, it knew how to express that intent. Because it did so only for federal criminal fines, when it could have done so for all fines, it may reasonably be presumed that Congress did not intend to except non-federal fines from discharge.

3. Section 523(a)(7) Represents Congress' Codification Of The Pre-Code Judicially Created Exception From Discharge Of Monetary Obligations Arising Out Of Criminal Proceedings Which Was Not Carried Over To Chapter 13 Discharges Granted Pursuant To § 1328(a)

As the Court recognized in *Kelly*, it is instructive to examine how penalties and forfeitures were treated under the Bankruptcy Act. Under § 57(j) of the Act, 30 Stat. 561, penalties and forfeitures owed to governmental entities were not "allowable" and such entities could not share in the distribution of the estate. Section 63 of the Act, 30 Stat. 562, established the separate concept of "provable" debts. The Act further provided in § 17, 30 Stat. 550, that only provable debts could be discharged. The relationship of allowability, provability and dischargeability was well summarized in the leading bankruptcy treatise:

> Debts of the types specified in § 63 may be proved. They also *may* be allowed. But whether a debt so proved will

> actually be allowed is a distinct issue, and one that depends not only on provability. Allowance of a claim is determined by the court on the merits as a judicial act . . . . The court may disallow a claim because it does not constitute a debt provable under § 63, or because . . . [inter alia] the claim is legally invalid . . . . The infinite variety of reasons for which a claim may be disallowed explains why a disallowed claim and a nonprovable debt are not identical things, and why *a creditor whose debt is disallowed is not necessarily in the position of a creditor having a nonprovable debt and therefore unaffected by the bankrupt's discharge.*

3A *Collier on Bankruptcy* ¶63.05, at 1775-76 (14th ed. 1975) (first emphasis in original, second emphasis supplied) (*quoted in In re Steckler*, 195 F. Supp. 879 (S.D. Ind. 1961)).

Because § 17 contained no express exception for discharge of criminal monetary penalties based upon a court judgment, and restitution appeared to satisfy the elements of provability under § 63, the "most natural construction"[16] of the Act would have been to hold penalties provable and dischargeable but not allowable. The consequences of such a construction would have been to hold criminal monetary penalties owed to governmental entities dischargeable without permitting such creditors to share in the distribution of the estate. This absurd and obviously unintended result was avoided under the Act by the development of a judicial exception to dischargeability of criminal monetary penalties. In effect, the courts held that because such obligations, for policy reasons, should not be dischargeable, they must also be held non-provable.[17]

It is significant that judicial exception to dischargeability was not applied only to *criminal* monetary penalties. It applied with equal force where penalties arising in civil proceedings

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[16] *Kelly*, 479 U.S. at 44.

[17] Indeed, as one court stated: "Since . . . true penalties . . . are clearly not dischargeable, it follows that they are not provable." *Sherwood* v. *United States*, 228 F. Supp. 247, 250 (E.D. N.Y. 1964).

had been assessed against the bankrupt.[18] The courts did not distinguish between the two types of penalties.

It is this background against which the fundamental modification of the concept of debt rendered by the Bankruptcy Code and its ramifications on dischargeability must be analyzed. By abolishing the concept of provability in the Bankruptcy Code and expanding the scope of "claim" and "debt" to the fullest, Congress also eliminated the conceptual basis employed under prior law for determining the dischargeability of both civil and criminal penalties. It therefore became necessary to explicitly provide, one way or another, for civil and criminal penalties in § 523, the Code's general dischargeability provision.

In short, the substantial textual changes Congress made in 1978 to the bankruptcy provisions governing the scope of the term "debt" and the scope of the bankruptcy discharge, when viewed against the relationship of the concepts under prior law, establish that § 523(a)(7) represents Congress' codification of the established judicial exception to discharge for all fines and

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[18] *United States* v. *RePuss*, 688 F.2d 154, 157-58 (2d Cir. 1982) (civil penalties under federal False Claims Act not provable or dischargeable); *In re Abramson*, 210 F. 878 (2d Cir. 1914) (civil penalties under state Agricultural Law not dischargeable or provable); *Custom Wood Prods., Inc.* v. *United States*, 338 F. Supp. 337, 339-40 (W.D. Mich. 1971) (tax penalties "are not provable debts . . . and thus not dischargeable"); *In re Steckler*, 195 F. Supp. 879 (S.D. Ind. 1961) (tax penalties not provable or dischargeable); *In re Di Vincenzo*, 1 B.R. 528, 531-32 (Bankr. S.D. N.Y. 1979) (tax penalties not provable or dischargeable). *See also In re Messenger's Merchants Lunch Rooms, Inc.*, 85 F.2d 1002, 1005 (7th Cir. 1936) (stating that tax penalties are not provable); *Sherwood* v. *United States*, 228 F. Supp. 247, 249-50 (E.D. N.Y. 1964) (stating that penalties and forfeitures are not provable or dischargeable); *People ex rel. Otterstedt* v. *Sheriff of Kings County*, 206 F. 566 (E.D. N.Y. 1913) (civil contempt fine not dischargeable).

penalties, both civil and criminal.[19] Indeed, in *Kelly*, the Court specifically stated that § 523(a)(7) "protects traditional criminal fines; *it codifies the judicially created exception to discharge for fines.*" *Kelly*, 479 U.S. at 51 (emphasis added). There is nothing in the text of this provision or the sparse legislative history to suggest that Congress intended to differentiate between civil and criminal fines and penalties when it carried the pre-Code dischargeability exception for penalties into § 523(a)(7).[20] By codifying prior law in § 523(a)(7), which is incorporated by reference in some other Code provisions but not in § 1328(a), Congress necessarily expressed its intent to

[19] Amicus Washington Legal Foundation, at p. 10 of its brief, inaccurately states that respondents concede that two cases, *United States* v. *Alexander*, 743 F.2d 472 (7th Cir. 1984), and *United States* v. *Carson*, 669 F.2d 216 (5th Cir. 1982), were correctly decided. No such concession was made because the cases are distinguishable. The defendant in *Carson* received a discharge in bankruptcy under the Bankruptcy Act; the defendant in *Alexander* received a chapter 7 discharge under the Bankruptcy Code. Neither case directly addressed the question of whether restitution was a debt. Instead, the courts' narrow holdings that federal judges were not precluded from ordering debtors to pay restitution in subsequent criminal proceedings for fraud presaged this Court's ruling in *Kelly*. To the extent these cases can be read to conclude that restitution is not a debt, they are incorrect. But since neither involved a chapter 13 bankruptcy discharge, they are not relevant here.

[20] Petitioners argue that the legislative history suggests that Congress was referring only to civil tax penalties in § 523(a)(7). Petitioners' Brief at 51. However, the Senate and House Reports do not support this conclusion. The Senate Report states that § 523(a)(7) "makes non-dischargeable certain liabilities for penalties *including* tax penalties . . . ." Senate Report at 79 (emphasis added). Petitioners' argument is also belied by the language of § 523(a)(7) which can only be read as viewing tax penalties as a subset of the larger categories of "fine, penalty, or forfeiture."

permit the discharge of fines and penalties in at least some chapter 13 cases.[21]

D. Congress' Intent To Classify Restitution As A Debt Is Expressed In Other Bankruptcy Code Provisions

The intent of Congress that restitution be classified as a claim in bankruptcy is demonstrated by other provisions of the Bankruptcy Code, which are fully consistent with that conclusion as well as with Congress' expressed preference for restitution to victims over punitive fines.

1. Section 726

The distribution of property of the debtor's estate is addressed by 11 U.S.C. § 726. That section states expansively, in pertinent part, that holders of claims for "*any* fine, penalty, or forfeiture" as well as punitive damages, are entitled to receive distributions, assuming the existence of sufficient property in the estate. 11 U.S.C. § 726(a)(4) (emphasis added). Thus, § 726(a)(4) is an explicit recognition that restitution is a debt. *Kelly*, 479 U.S. at 58 (Marshall, J., dissenting).

The text of § 726 also refutes the argument that Congress meant the terms fines, penalties and forfeitures to refer only to civil obligations. Section 726 distinguishes fines, penalties and forfeitures from civil penalties such as "multiple, exemplary or punitive damages." This distinction strongly suggests that Congress meant the terms fines, penalties and forfeitures to be given their commonly understood criminal connotation.

It is also not anomalous for fines and penalties to be given a lower priority than other claims for the simple reason that,

[21] Part II, *infra*, discusses how the conclusion that fines may be discharged in some chapter 13 cases is wholly harmonious with fundamental bankruptcy policies as well as particular policies embodied in chapter 13.

under this Court's decision in *Kelly*, they are nondischargeable in chapter 7 (as well as in chapter 12, many chapter 11 cases, and chapter 13 hardship discharge cases). The holder of a restitution claim in a chapter 7 case has not only the right to share in the bankruptcy estate but also the right to pursue the debtor's income and assets acquired after the bankruptcy filing.

Indeed, including criminal monetary claims in bankruptcy is necessary to prevent an undesirable clash between federal and state courts over the property of the bankruptcy estate. There can be little doubt that the federal district court, normally acting through the bankruptcy court, has exclusive jurisdiction over the property of the debtor as of the filing of the bankruptcy petition. 28 U.S.C. § 1334(d); 11 U.S.C. § 541(a). To the extent a state court fine or restitution order contemplated the debtor liquidating that same property in order to comply, attempts to enforce that payment outside of the bankruptcy system would create an inevitable confrontation between the state court and the federal court over the disposition of the property.

Absent a lien securing the state criminal court's fine or restitution order, any attempt by the state to look to property of the bankruptcy estate for payment outside of bankruptcy would place it squarely in conflict not only with the functioning of the bankruptcy system but also with the interests of other creditors. These other creditors might well include other victims of crimes who had not obtained restitution orders. Such a result would undermine the fundamental bankruptcy policy of treating like creditors equally.

The conflict with bankruptcy policy would be exacerbated if the state sought, after the bankruptcy filing, to enforce a purely penal fine or forfeiture, rather than a restitution order. In such a case, the state would be seeking payment from assets that would otherwise go to those with damage claims against the debtor, including crime victims. Allowing such efforts would directly contravene the Congressional policy of providing restitution to crime victims rather than fines to the government when there are insufficient funds available to pay both. *See* S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982). It would also greatly impair the pervasive federal bankruptcy jurisdiction over the debtor's property contemplated not only by the Bankruptcy Code, but also by the Constitution.

Moreover, far from creating an anomalous result, as suggested by the Solicitor General, this common sense reading of § 726 as including criminal monetary obligations works to the benefit of victims entitled to restitution, as well as others whom the debtor may have harmed. Such persons, by virtue of the damages caused them by the debtor, would also normally be holders of unsecured claims[22] and thereby be entitled to share in the property of the debtor distributed in the bankruptcy. Unsecured claims for damages are given a higher priority under § 726(a)(2) than a government's claim for a purely penal fine, which may only be paid under § 726(a)(4) after all general unsecured claims have been paid in full. This ranking, which prevents government fines from preempting or diluting the claims of victims and other creditors, is completely consistent with Congressional policy, expressed in recent legislation, that payment to victims of crimes is preferred over fines where the defendant does not have the ability to pay both. 18 U.S.C. § 3572(b). It is also a traditional principle in bankruptcy law. *See Simonson* v. *Granquist*, 369 U.S. 38, 41 (1962) (enforcement of monetary penalties against the debtor is disfavored because it serves to "punish . . . entirely innocent creditors").

Further, in a chapter 7 case where the debtor is a corporation or an individual with substantial property but little or no income, if the crime victim does not file a claim, payment of the restitution order under § 726(a)(4) may be the only possible way for the victim to recover.[23]

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[22] A victim could also be the holder of a secured claim if a judgment and execution lien had been obtained prior to bankruptcy.

[23] Unsecured creditors may receive distributions in a chapter 7 case only if they file claims. 11 U.S.C. § 726(a)(2).

2. Section 362(b)

In light of the broad language Congress employed when it defined the term "claim" in § 101(4), it is instructive that elsewhere in the Code, Congress specifically referred to criminal proceedings when it wished to insulate such proceedings from the reach of the Code.

Section 362 (b) of the Code excepts from the broad reach of the automatic stay,[24] "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b). As the court of appeals stated, "[n]owhere in the discussion of either claim or debt, however, does Congress express a similar intention to restrict those definitions to exclude obligations arising from criminal penalties." *In re Johnson-Allen*, 871 F.2d at 427. The very existence of § 362(b) illustrates again that Congress knew how to express its intent to except criminal proceedings from the bankruptcy process when it wished to do so. *Accord* 18 U.S.C. § 3613(f) (excepting federal criminal fines from all types of bankruptcy discharge). *See also* Part I C 1, *supra*.

Petitioners' reliance on § 362(b) in support of their position is misplaced. The existence of an exception to the automatic stay for a particular type of obligation simply does not bear on whether that obligation is a bankruptcy "claim." The concepts are different. For example, alimony, maintenance and support obligations are excepted from the automatic stay to a significant degree. 11 U.S.C. § 362(b)(2). Yet, it is indisputable that such obligations are bankruptcy claims.

To the extent § 362(b) is relevant, it illustrates that Congress carefully distinguished between permitting certain non-

[24] 11 U.S.C. § 362(a) of the Code automatically stays, upon the filing of a bankruptcy petition, a broad range of formal legal actions as well as informal action directed against the debtor or property of the bankruptcy estate. *See* 2 *Collier on Bankruptcy* ¶ 362.04 (15th ed. 1989).

bankruptcy proceedings or actions to take place after a bankruptcy case has been filed and the enforcement of claims or judgments against the debtor or property of the estate. Congress drafted § 362(b) in such a way as to protect the estate's assets for the benefit of all creditors and to minimize the potential conflict between bankruptcy and nonbankruptcy courts over the administration of the debtor's assets.

This policy is expressed in the language of § 362(b)(1) which refers to the "commencement or continuation" of a criminal proceeding but not to the "recovery of a claim" or the "enforcement of a judgment." *See also* 11 U.S.C. § 362(b)(2) (permitting holders of alimony, maintenance or support claims to proceed only against property that is not property of the estate).

The same distinction is made in § 362(b)(4) and (5). Section 362(b)(4) excepts from the automatic stay, § 362(a)(1), "the commencement or continuation" of governmental actions to enforce police or regulatory power. Section 362(b)(5) separately excepts from the automatic stay, § 362(a)(2), the "enforcement" of a judgment obtained in an action to enforce governmental, police or regulatory power. Significantly, even where Congress excepted enforcement of police or regulatory judgments from the automatic stay, it prohibited the government from enforcing a "money judgment." 11 U.S.C. § 362(b)(5). The legislative history of § 362(b)(5) explains the reason for this prohibition:

> Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

Senate Report at 52; House Report at 343.

In sum, the very existence of § 362(b)(1) as an express exception to the automatic stay as well as the distinction Congress consistently drew between commencing or continuing legal

proceedings on the one hand, and recovering a claim or enforcing a judgment on the other hand, demonstrate that Congress contemplated that restitution obligations are debts cognizable in bankruptcy.

II. THE CLASSIFICATION OF A CRIMINAL RESTITUTION OBLIGATION AS A DEBT UNDER THE BANKRUPTCY CODE IS WHOLLY HARMONIOUS WITH THE PURPOSES AND POLICIES OF CHAPTER 13

A. Introduction

The two principal purposes of bankruptcy are to provide equity among creditors and a fresh start for the debtor. The fresh start purpose is designed to allow individuals who have become mired in debt to free themselves from that burden and engage in newly productive lives unhampered by the pressure and discouragement of preexisting debt. *E.g.*, *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The goal of equity among creditors is achieved by the fair distribution of the debtor's assets according to established rules, set forth in the Code, which guarantee similar treatment to similarly situated creditors. *See*, *e.g.*, House Report at 177-78.

In substantially revising chapter 13 of the Bankruptcy Code in 1978, Congress clearly expressed its intent to make consumer debtor rehabilitation payment plans an attractive alternative to the straight liquidation of chapter 7 and to address the problems which had caused former chapter XIII to be underutilized under the Act. *See* House Report at 116-18. As in the other Code chapters, under chapter 13, Congress sought to accommodate fairly both debtors and creditors[25] and to achieve

[25] The House Report states:

> The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

House Report at 118. *See also* 5 *Collier on Bankruptcy* ¶ 1300.02 (15th ed. 1989).

a balance of the competing interests which arise in bankruptcy cases. The applicable Code provisions accord significant rights to both debtors and creditors. The creation of such a delicately balanced system obviates the need for the expansive holding urged by petitioners—a holding that would exclude entirely one class of monetary obligations from the comprehensive system of administering debts found in chapter 13.

When this system is examined more closely, it is apparent that chapter 13 either accommodates or rejects the various policy concerns articulated by petitioners and their supporting amici. Further, it also becomes apparent that the spectre of routine bankruptcy discharge of restitution obligations posited by petitioners and amici is unfounded. What chapter 13 provides is the opportunity, in circumscribed, appropriate cases, for an individual to propose a financial rehabilitation plan which will provide for payment in full or in part of a restitution obligation, according to the debtor's ability to pay.

B. Placing Restitution Outside The Bankruptcy System Is An Overbroad, Unnecessary Response To A Perceived Danger Of Abuse Of The Bankruptcy Code And Would Frustrate Fundamental Bankruptcy Policy

The detailed system for adjustment of debts established by Congress in chapter 13 is neither one-sided in favor of debtors nor so loosely drafted as to permit individuals, such as those who have looted the nation's savings and loan system or who have committed other wrongful acts which give rise to substan-

tial damage awards, to take advantage of its rehabilitative provisions. Individuals who owe unsecured claims in excess of $100,000 or secured debts in excess of $350,000 may not be debtors under chapter 13. 11 U.S.C. § 109(e).[26] Thus, Congress limited access to the expansive § 1328(a) discharge, at least in part, by a bright-line rule based on the total sum of the debtor's obligations.

The fear expressed by the Solicitor General that a corporation may use chapter 11 in an effort to escape its restitution debts is overstated. If a corporation lacks unencumbered assets out of which claims may be paid and cannot effectively reorganize to generate income, a restitution claim will not be paid regardless of whether a bankruptcy petition is filed. Whether in or out of bankruptcy, once such a corporation ceases doing business and its encumbered property is used for satisfaction of secured debts, all that will remain is a corporate shell with no assets for distribution to any unsecured creditors. If the corporation liquidates under chapter 11, it may not even receive a discharge. *See* 11 U.S.C. § 1141(d)(3).

Moreover, in any chapter 11 case in which a corporate debtor seeks to reorganize, its chapter 11 plan is subject to numerous requirements that effectively limit a debtor's ability to avoid restitution obligations. Included among those requirements are the requirements that the plan be proposed in "good faith," *see* n.30, *infra* and accompanying text, and be accepted, in most instances, by a vote of the holders of a class of claims impaired by the plan. *See* 11 U.S.C. § 1129(a)(3), (8)(B); *id.* § 1126.

Once a qualified debtor files a petition under chapter 13, creditors have substantial rights, including: (1) the right of secured creditors to demand adequate protection of their security interests while the bankruptcy case is pending and to

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[26] If such an individual qualifies to file a chapter 11 bankruptcy petition, the debts falling within the scope of § 523(a) cannot be discharged in such a case. 11 U.S.C. § 1141(d)(2).

demand payments equalling the present value of the claims under any plan proposing to satisfy such claims in installments;[27] (2) the right of unsecured creditors to demand payments having a present value equal to the distribution they would have been paid if the debtor liquidated under chapter 7;[28] and (3) the right of unsecured creditors to insist that a debtor devote all projected "disposable income" for three years toward payments to be made under the chapter 13 plan if the plan does not propose to pay their claims in full.[29]

These rights accorded to creditors under the Bankruptcy Code guarantee that a debtor with sufficient income or property to pay a restitution obligation through a chapter 13 plan will do so. Chapter 13 provides no haven for an individual to escape payment of obligations that he can afford to pay.

Perhaps the most important protection against abuse of the Bankruptcy Code is the bankruptcy court's power to deny confirmation of a chapter 13 plan which has not been proposed "in good faith." 11 U.S.C. § 1325(a)(3). The courts of appeals have outlined a list of factors which bankruptcy courts should consider in determining whether a chapter 13 plan has been proposed in good faith.[30] One factor, though by no means an

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[27] 11 U.S.C. § 362(d)(1); *id.* § 1325(a)(5).

[28] 11 U.S.C. § 1325(a)(4).

[29] 11 U.S.C. § 1325(b). As the bankruptcy judge observed in this case:

> If restitution is not a debt governed by a chapter 13 plan, then either the debtor cannot comply with § 1325(b), or the definition of disposable income must be adjusted. The former result would defeat the congressional goal of encouraging the use of chapter 13; the latter result would defeat the equality of treatment principle focused in 11 U.S.C. § 1322(a)(3), for the prepetition victim would receive greater payments than other unsecured creditors.

In re Davenport, 83 B.R. at 315.

[30] *E.g.*, *In re LeMaire*, 883 F.2d 1373 (8th Cir. 1989); *In re Smith*, 848 F.2d 813 (7th Cir. 1988).

exclusive one, is consideration of the existence and treatment of debts which would be nondischargeable under chapter 7. Courts have not hesitated to deny confirmation of plans which did not satisfy the good faith requirement.[31]

Any creditor who believes, for any reason, that a chapter 13 plan should not be confirmed may file an objection to confirmation. *See* Bankr. Rule 3020(b). In this case, petitioners did not avail themselves of any of the rights accorded creditors under chapter 13 and filed no objection to confirmation of the debtors' proposed chapter 13 plan.

In short, the comprehensive system enacted by Congress already resolves the competing interests which arise when a debtor with § 523(a) obligations seeks chapter 13 relief. The broad holding urged by petitioners not only conflicts with the plain language of both § 101(4), (11) and § 523(a)(7), but also undermines fundamental bankruptcy policies. By arguing that restitution is not even a debt under the Code, petitioners seek to place their claim completely outside the bankruptcy system and to receive more favorable treatment than that to be accorded to all of the other creditors of a chapter 13 debtor—including other creditors holding § 523(a) claims.

In effect, petitioners seek super-priority status, to be paid in full before all other monetary obligations of the debtor. Had Congress intended such a result, it would have expressed that intent directly, either in 11 U.S.C. § 1322(a)(2), which requires that certain obligations be paid in full through any chapter 13 plan, or elsewhere. It makes much more sense to construe the Code to provide for the adjustment of all of the debtor's obligations in the bankruptcy court—a single forum which can

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[31] *E.g.*, *In re Chase*, 43 B.R. 739 (D. Md. 1984); *In re Kourtakis*, 75 B.R. 183 (Bankr. E.D. Mich. 1987); *In re Todd*, 65 B.R. 249 (Bankr. N.D. Ill. 1986); *In re Wall*, 52 B.R. 613 (Bankr. M.D. Fla. 1985); *In re Boyd*, 57 B.R. 410 (Bankr. N.D. Ill. 1983); *In re Weyand*, 33 B.R. 553 (Bankr. D. Colo. 1983); *In re Terry*, 9 B.R. 314 (Bankr. D. Colo. 1981); *In re Leal*, 7 B.R. 245 (Bankr. D. Colo. 1980).

coherently, efficiently and equitably administer the debtor's financial affairs without competition or conflict with other courts. *See* House Report at 43-48.

Finally, the result urged by petitioners and supporting amici would also totally exclude from chapter 13 relief debtors who otherwise could, under the protection of the bankruptcy court, successfully adjust all of their debts, including § 523(a) obligations. For example, an individual may be able to propose a chapter 13 plan in which he pays his unsecured debts, including a restitution claim, in full (albeit with lower monthly payments and over a longer period of time than set by the restitution order), and at the same time cures a delinquency on a home mortgage or car loan. Placing restitution outside the bankruptcy process could effectively deny such an individual the opportunity to formulate a feasible chapter 13 plan. Without chapter 13 relief, the individual may lose his home and incur increased shelter costs (which might render him financially unable to pay the restitution obligation), or may lose a car needed to get to and from work (which could result in the loss of the very employment income needed to pay the restitution). The end result could well be that neither the restitution order nor the other unsecured creditors would be paid. *See generally In re Otero*, 48 B.R. 704 (Bankr. E.D. Va. 1985) (discussing negative consequences to all creditors from denial of chapter 13 relief to debtor with substantial prepetition debt arising from his wrongdoing).

The foregoing example illustrates that totally barring debtors from proposing a feasible chapter 13 plan can, in some cases, only result in harming both the restitution claimants and the other creditors. At best, the result urged by petitioners will benefit restitution claimants at the expense of other creditors, including other creditors holding claims falling under § 523(a). This is neither consistent with fundamental bankruptcy policy nor necessary to prevent abuse of the bankruptcy laws. Accordingly, the Court should reject the overbroad holding advocated by petitioners and amici and instead hold that

restitution is a debt which can be paid, or in some appropriate cases, partially paid and discharged in chapter 13.

C. The Broad Chapter 13 Discharge Under § 1328(a) Implements The Equal Treatment Of Creditors And Fresh Start Principles That Are Fundamental To The Bankruptcy Code

In order to make chapter 13 more accessible and beneficial to debtors, Congress provided debtors with various rights, many of which did not exist under prior law. Under current chapter 13: (1) eligibility is expanded from wage earners to individuals "with regular income";[32] (2) the debtor is afforded adequate property exemptions to foster the rehabilitation and financial fresh start;[33] (3) the debtor is provided with the power to avoid certain prepetition and postpetition liens and property transfers;[34] (4) the debtor may formulate a plan in which defaults on secured debts may be cured or secured obligations are modified;[35] and (5) the debtor's plan must be confirmed without creditor voting or approval if it meets explicit statutory standards.[36]

In addition, the scope of the discharge under § 1328(a), when a debtor completes his plan payments, is broader than that provided under other Code provisions. In chapter 7, chapter 12 and in many chapter 11 and chapter 13 cases, various types of obligations arising from wrongful prepetition conduct by the debtor are nondischargeable due to policy judgments made by Congress, including debts arising from fraud, embezzlement, larceny, willful and malicious injury and drunk driving. 11 U.S.C. § 523(a). It is indisputable that such debts may be

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[32] 11 U.S.C. § 109(e).

[33] 11 U.S.C. § 522(b), (d).

[34] 11 U.S.C. § 522(f), (g), (h). *See also* 11 U.S.C. §§ 544, 545, 547, 548, 549.

[35] 11 U.S.C. § 1322(b).

[36] 11 U.S.C. § 1325(a).

discharged under § 1328(a). *Compare* 11 U.S.C. § 523(a)(2), (4), (6), (9) *with id.* § 1328(a). *See also* 5 *Collier on Bankruptcy* § 1328.01[1][c] (15th ed. 1989). This is a clearly intended, substantial change from prior law.[37]

Thus, Congress was well aware that debts about which our society makes strong, negative moral judgments are subject to discharge under § 1328(a). The plain language and structure of the Code provide no basis to distinguish § 523(a)(7) debts from other § 523(a) debts for purposes of the § 1328(a) discharge.[38]

From a policy perspective, application of the broad chapter 13 discharge implements both of the fundamental purposes of bankruptcy—equal treatment of creditors and a fresh start for debtors. A chapter 13 debtor who makes his best effort to repay his creditors by submitting all of his disposable income to the trustee for a three year period is rewarded by the broader discharge provided by § 1328(a).[39] *See, e.g., In re Rimgale*, 669 F.2d 426, 428 (7th Cir. 1982). This, in return, enhances the possibility that creditors will receive satisfaction of their claims, in whole or in part.

To exclude restitution obligations from the bankruptcy process would be to prefer creditors holding § 523(a)(7) claims over all other creditors, including creditors holding other § 523(a) claims and perhaps other victims of crimes, thus undermining the equal treatment of creditors principle. Such a result is particularly inappropriate in light of the long-standing bank-

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[37] Under § 660 of the Bankruptcy Act, 52 Stat. 935, *as amended*, 66 Stat. 437, a debt that was nondischargeable under § 17 could not be discharged under chapter XIII without the agreement of the creditor holding the claim.

[38] The one exception, of course, is a § 523(a)(5) debt for alimony or support which is expressly excluded from a chapter 13 discharge. 11 U.S.C. § 1328(c)(2).

[39] By comparison, a chapter 13 debtor who does not complete performance of his plan obligations can receive, at best, a discharge no broader than that provided by chapter 7. 11 U.S.C. § 1328(b).

ruptcy policy against enforcing penalties against the debtor at the expense of the other innocent creditors. *See, e.g., Simonson*, 369 U.S. at 41.

III. THE CONCLUSION THAT CRIMINAL RESTITUTION IS A DEBT DOES NOT UNDULY INTERFERE WITH STATE CRIMINAL PROSECUTIONS

A. The Federalism Concerns Of *Younger* v. *Harris* Are Not Significantly Implicated

Throughout this case, petitioners have sought to portray a chapter 13 discharge as an impermissible intrusion on state interests. Such a view is unfounded. Petitioners greatly exaggerate the effect of declaring criminal restitution to be a debt. Moreover, to the extent there is tension between federal bankruptcy policy and state interests, that is simply an example of the balance between federalism and supremacy.

Petitioners rely heavily on this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971). In *Younger*, the Court held that federal injunctive relief against state criminal prosecutions should be granted only in extraordinary circumstances where the danger of irreparable loss is both great and immediate and where a statute on its face abridges first amendment rights or where a criminal prosecution is conducted in bad faith or for harassment. *Id.* at 53-54.[40]

The same court from which petitioners appeal here has shown its concern for federalism in bankruptcy cases. In *In re*

[40] While *Younger* restricts the equitable jurisdiction of federal courts, its applicability is limited in the bankruptcy context. The discharge provision of the Bankruptcy Code, 11 U.S.C. § 524(a)(2), is a *statutory* injunction, an injunction imposed by Congress, not by a court exercising its equitable powers. For statutory injunctions to have any meaning, courts must enforce them even in circumstances where courts themselves would not grant equitable relief. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 738 F.2d 209, 212-13 (7th Cir. 1984).

Davis, 691 F.2d 176 (3d Cir. 1982), the court of appeals affirmed the lower court decision refusing to enjoin a Delaware criminal bad check proceeding where it was alleged that the purpose of the proceeding was to collect a dischargeable debt. The court declined to presume that Delaware would disregard the debtors' federal law defense to the prosecution. *Davis*, 691 F.2d at 178.

The Davenports do not seek to enjoin a state criminal proceeding; they recognize that such a proceeding may continue. The federalism concerns articulated in *Younger* are not significantly implicated here. As far as debtors are concerned, DPW or the Probation Department may institute revocation of probation proceedings at any time. Debtors instituted this proceeding primarily[41] to obtain a declaration of the extent of their rights to a discharge under chapter 13.

Petitioners' claims of interference in state court proceedings are unduly alarmist. Because of *Bearden* and similar Pennsylvania law,[42] the state court would not afford appreciably different treatment to the indigent defendant who was unable to fulfill the restitution condition of probation than would be afforded the indigent defendant who has filed bankruptcy under chapter 13. In neither case could the defendant be forced to pay that which he does not have. But, in each situation, the state court still has an array of alternative resolutions available. Conditions of probation could be altered to require some type of community service, or enlistment in a work program or other activity that would result in compensation to the vic-

[41] Debtors' Complaint to Determine Dischargeability of Debt did request injunctive relief. J.A. 31a. Debtors never pressed that request and, in fact, voluntarily appeared, after the bankruptcy trial, at the state court probation revocation hearing. 3d Cir. App. 162a - 179a.

[42] *E.g., Commonwealth ex rel. Parrish* v. *Cliff*, 451 Pa. 427, 304 A.2d 158 (1973).

tim.[43] The state court would be free, without interference from the bankruptcy court, to impose any remedy available other than compelling a debtor to pay a discharged debt.

Indeed, as occurred in this case, when the Davenports defaulted on their restitution payments, the Probation Department initiated a revocation hearing. The debtors voluntarily appeared and testified to their inability to pay restitution. The state court simply concluded that there was no willful failure to pay and denied the motion to revoke probation. 3d Cir. App. 178a. The outcome of the revocation hearing was therefore the same as if no bankruptcy had ever been filed. Thus, petitioners' claim that a bankruptcy discharge would unduly hamper state court proceedings is greatly exaggerated. The bankruptcy courts which have held restitution to be a debt have limited only the collection of restitution, leaving the state otherwise free to prosecute the criminal conduct underlying the debt.[44]

Petitioners also argue that discharging restitution would detract from the sentencing judge's flexibility in fashioning appropriate criminal penalties. This argument may have superficial appeal but it overlooks several important realities. First, the applicable statute in this case, Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989), mandated the entry of a restitution order; no flexibility existed in the first place.[45] Second, to

[43] Some states specifically provide for work programs in lieu of monetary restitution. Del. Code Ann. tit. 11, § 4106(b) (1987); Ky. Rev. Stat. Ann. § 533.030(3) (Michie/Bobbs-Merrill Supp. 1988).

[44] *E.g.*, *In re Brown*, 51 B.R. 51 (Bankr. E.D. Ark. 1985); *In re Farrell*, 43 B.R. 115 (M.D. Tenn. 1984); *In re Holder*, 26 B.R. 789, 793 (Bankr. M.D. Tenn. 1982); *Lawson* v. *Boczonadi*, 22 B.R. 100, 104 (Bankr. S.D. Ohio 1982); *Johnson* v. *Lindsey*, 16 B.R. 211 (Bankr. M.D. Fla. 1981). One federal district court reversed a bankruptcy court injunction against a bad-check prosecution but saw some merit in injunctions limited to restitution sentences themselves. *In re Klawson*, 50 B.R. 776, 779 (N.D. Ind. 1985).

[45] *E.g.*, Ariz. Rev. Stat. Ann. § 13-901(A) (1989); Ark. Code Ann. § 16-90-303 (1987); Colo. Rev. Stat. § 16-11-204.5(1) (West Supp. 1989); Iowa Code Ann. § 910.2 (West Supp. 1989); Tenn. Code Ann. § 40-20-116 (1982).

the extent a defendant is indigent, restitution could not be compelled anyway. *Bearden* v. *Georgia*, 461 U.S. 660 (1983). Third, as discussed in Part II B, *supra*, not all criminal defendants could qualify for chapter 13 relief. Finally, to the limited extent a state court's sentencing prerogatives are reduced, that is a result of the choice made by Congress when it enacted the comprehensive bankruptcy system in 1978. *See* Part III C, *infra*.

B. The Provisions Of Chapter 13 Are In Harmony With The Purposes Of Restitution And Accord Due Respect To State Criminal Court Determinations

Petitioners also raise the spectre of massive interference with state court criminal sentences due to large numbers of chapter 13 cases filed to avoid criminal restitution. In fact, there would be no such interference because the principles of chapter 13 bankruptcy are basically consistent with those underlying criminal restitution statutes. As petitioners and amici point out, both state and federal restitution statutes serve the important goal of providing payment to victims of the debtor's acts. Such statutes also are premised upon the principle that defendants may only be ordered to remit amounts within their ability to pay. Chapter 13 has the same goal—to provide for payment to those who have suffered damages due to the debtor's acts, consistent with the debtor's ability to pay.

Section 1325(b) of the Bankruptcy Code, 11 U.S.C. § 1325(b),[46] provides that either the chapter 13 trustee or any

[46] 11 U.S.C. § 1325(b) states as follows:

> (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposal income to be received in the three-year period beginning on the date that the first payment is due under the plan will be

holder of an unsecured claim may object to and prevent confirmation of any plan that does not either pay unsecured debts in full or devote all of the debtor's disposable income over three years to payment of debts under the plan. "Disposable income" is defined by that same section to mean all income not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor. 11 U.S.C. § 1325(b)(2)(A).

In any chapter 13 case involving a criminal restitution debt, if the debtor does not propose a plan meeting this "ability-to-pay test," the chapter 13 trustee, or the prosecutor, or the victim (who is also the holder of an unsecured claim) may file an objection to prevent confirmation of the plan and the ultimate discharge of the debt.[47] Such objections are routinely filed by chapter 13 trustees throughout the country, who view such filings as an important aspect of their duties.

In determining such objections, the federal bankruptcy court is bound by normal principles of collateral estoppel, just as it is bound with respect to other issues, such as dischargeability. *See, e.g., Klingman* v. *Levinson*, 831 F.2d 1292 (7th Cir. 1987); *In re Pitner*, 696 F.2d 447 (6th Cir. 1982). If the issue of ability to pay has been litigated in the state criminal proceeding, with consideration given to the debtor's obliga-

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applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the necessary payment of expenditures necessary for the continuation, preservation, and operation of such business.

[47] Neither the prosecutor, the Probation Department nor DPW bothered to file such an objection in this case.

tions to dependents as well as other creditors,[48] and if there has been no material change in circumstances,[49] the bankruptcy court is bound by the state court's determination of the debtor's ability to pay.

Since the bankruptcy court could not deviate from the determination of the state criminal court in such cases, the filing of a chapter 13 petition would offer no advantage to criminal defendants. Not only would they be required to continue payments consistent with their ability to pay, but also they would be required to meet all of their other obligations to creditors, plus pay a trustee's commission[50] (usually about 10%) on all payments through the plan, plus pay a filing fee and, normally, an attorney's fee for the bankruptcy filing. For this reason, it is not surprising that petitioners and amici have been unable to

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[48] Where the criminal restitution decision did not take into account the debtor's obligations to other creditors (who may include other crime victims or individuals with tort claims more sympathetic than the claims of welfare departments or holders of bad checks) the bankruptcy court cannot simply accept the state court's determination. It is essential that the bankruptcy court assure equitable treatment of all creditors, so that uneven distribution of the debtor's assets and income does not result from a race to the courthouse on the happenstance that one judge awarded restitution to one victim while a different judge did not award restitution to another.

[49] To the extent that circumstances have changed to render the debtor unable to pay all or part of the restitution obligation, petitioners themselves readily concede that a criminal court would not require payment. Petitioners' Brief at 29. A bankruptcy court, which regularly makes determinations of ability to pay, is certainly competent to determine whether such changes have occurred. And just as bankruptcy courts must respect state court determinations, there is no reason state criminal courts should not be able to respect determinations of federal bankruptcy courts in an area of overlapping responsibilities.

[50] *See* 28 U.S.C. § 586(e).

point to any perceptible increase in chapter 13 filings by criminal defendants subject to restitution orders in the Third Circuit since the decision of the court of appeals in this case. Combined with the bankruptcy court's ability to deny confirmation if a plan is not filed in good faith, the ability-to-pay test assures that chapter 13 will not become a vehicle for circumventing criminal restitution obligations that debtors can afford to pay. Indeed, chapter 13 assures that all those damaged by the debtor's acts will be treated on a basis that Congress determined to be fair and equitable.

C. The Balancing Of Bankruptcy Policy And The States' Interest In Collecting Restitution Must Be Resolved By Congress, Not The Court

To the extent that application of bankruptcy principles impacts on state court proceedings, that is a result intended by Congress. Petitioners argue that this result is prohibited by principles of federalism and comity. But the competing and countervailing principle is that embodied in the Supremacy Clause. United States Constitution, article VI, clause 2. This Court recently discussed supremacy:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

Northwest Central Pipeline Corp. v. *State Corp. Comm'n.*, 109 S.Ct. 1262, 1273 (1989) (citations omitted).

Only Congress can dictate the scope of a discharge in federal bankruptcy cases, and only Congress has the constitutional power to provide for the discharge of certain debts and to except other debts from discharge in such cases. United States

Constitution, article I, section 8, clause 4; *Stellwagen* v. *Clum*, 245 U.S. 605 (1918).

Congress expressly provided for the discharge under § 1328(a) of all debts except those for alimony, maintenance and support and certain obligations of the type set forth in § 1322(b)(5). That provision unequivocally manifests the Congressional intent that a debtor in chapter 13 be afforded a broad discharge in order to encourage the debtor to file under chapter 13 rather than chapter 7, and then to complete payments under a plan. *See* 11 U.S.C. § 1328(a); 5 *Collier on Bankruptcy* § 1328.01[1][c].[51] To hold otherwise would permit a state statute to frustrate the full effectiveness of federal bankruptcy law. *Perez* v. *Campbell*, 402 U.S. 637, 653 (1971).

Permitting restitution creditors to ignore the bankruptcy process would encourage circumvention of the comprehensive system of uniform bankruptcy laws enacted by Congress. If restitution is held not to be a debt, one unfortunate consequence could be an increase in creditors' resort to the state criminal process to collect debts, raising the spectre of a potential return to the days of debtors' prison. *See* Kratsch and Young, *Criminal Prosecutions and Manipulative Restitution: The Use Of State Criminal Courts For Contravention Of Debtor Relief*, 1984 Ann. Surv. Bankr. L. 107. For example, some states require restitution if the debtor is convicted of passing bad checks.[52] Other states permit restitution in the sentencing court's discretion.[53] Still other states have imple-

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[51] This inescapable conclusion is further bolstered by the fact that if a debtor fails to complete payments, but obtains a "hardship" discharge under § 1328(b), restitution obligations are not discharged. 11 U.S.C. § 523(a).

[52] *E.g.*, Ga. Code Ann. § 16-9-20(b)(4) (1988 & Supp. 1989); Wash. Rev. Code Ann. § 9A.56.060(5) (1988).

[53] *E.g.*, Colo. Rev. Stat. § 18-5-205 (1986); Del. Code Ann. tit.11, § 900A(a) (Supp. 1988); Idaho Code § 18-3106(f) (1987); La. Rev. Stat. Ann. § 14:71(G) (1986 & Supp. 1989); Minn. Stat. Ann. § 609.535

mented bad check restitution programs whereby the prosecutor may defer prosecution if the defendant agrees to pay restitution.[54] There have been repeated attempts by creditors to use the criminal process to collect debts under such statutes. Bankruptcy courts have decried the use of bad check criminal prosecutions for this purpose and have enjoined creditors who have attempted to use such tactics.[55] Nor has this form of debt collection been limited to bad check cases. *See In re Van Riper,*

(West 1987 & Supp. 1990); Miss. Code Ann. § 97-19-67 (Supp. 1988); Mont. Code Ann. § 45-6-316 (1988); Neb. Rev. Stat. § 28-611(6) (Supp. 1988); N.C. Gen. Stat. § 14-107 (1986); Tex. Penal Code Ann. § 32.41(e) (Vernon 1989); Wis. Stat. Ann. § 943.24 (West 1982 & Supp. 1989); Wyo. Stat. Ann. § 6-3-702(c) (1983).

[54] *E.g.*, Ariz. Rev. Stat. Ann. § 13-1810(E) (1989) (county attorney may defer prosecution if defendant agrees, among other conditions, to pay restitution); Fla. Stat. Ann. § 832.08 (West Supp. 1989) (restitution as condition of defendant entering bad check diversion program); Okla. Stat. Ann. tit. 22, § 111 (West Supp. 1990) (district attorney may refer defendant to Bogus Check Restitution Program); Tenn. Code Ann. § 40-3-203 (Supp. 1989) (prosecution may be deferred if defendant agrees to participate in restitution program).

[55] *In re Dettler Farms*, 58 B.R. 404 (Bankr. D. S.D. 1986) (creditor enjoined from use of criminal process to extract preference over other creditors); *In re Redenbaugh*, 37 B.R. 383 (Bankr. C.D. Ill. 1984) (creditor who deliberately waited until bankruptcy terminated before filing criminal action to obtain restitution enjoined from receiving any portion of claim that was discharged); *In re Whitaker*, 16 B.R. 917, 922 (Bankr. M.D. Tenn. 1982) (the use of criminal proceedings to compel payment of restitution "is so engrained in the criminal system of this state that the creditor . . . referred to his practice of dealing with bad checks as 'turn[ing] them into the Sessions Court for collection'"); *In re Barnett*, 15 B.R. 504, 507 (Bankr. D. Kan. 1981) ("*the vast majority of merchants and others who receive worthless checks regard law enforcement officers and the courts as mere agencies to collect their money*") (emphasis in original). Some courts have gone further and enjoined prosecutors or state courts. Respondents do not believe such orders are necessary or appropriate. *See In re Davis*, 691 F.2d 176 (3d Cir. 1982).

25 B.R. 972 (Bankr. W.D. Wis. 1982) (where creditors threatened to use the criminal process to collect a debt from a bankrupt contractor, the court held the creditors and their attorneys in contempt for violation of the automatic stay).

Considering the potential abuse inherent in the use of the criminal process to collect debts, it is understandable that Congress did not intend to make restitution orders nondischargeable *per se*.[56]

Interpreting the Code to allow a chapter 13 debtor to pay restitution through his plan does not offend the boundaries of state powers. Rather, it strikes the delicate balance between the concepts of federalism and supremacy. Congress expanded not only the definition of "debt" in enacting the Code, but also the availability of chapter 13 in order to create a comprehensive system for a fair and equitable adjustment of all financial obligations. At the same time, states may fashion other appropriate criminal remedies which will remain unaffected by bankruptcy courts.

Whether there are policy considerations behind restitution obligations that outweigh federal bankruptcy policy is a question for Congress, not for the courts. As the court of appeals stated below:

> . . . where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of this court to cure any perceived "defects" in that legislation. That authority is granted to Congress alone.

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[56] Delegating to a state the power to decide dischargeability has also been criticized as an unwarranted enlargement of the state's role in the federal bankruptcy system. Ballam, *Kelly* v. *Robinson Revisited: Dischargeability of Restitution Obligations in Chapter 13 Bankruptcy Proceedings*, 34 St. Louis U.L.J. 1 (1989); McCafferty & Bubis, *Criminal Restitution And The Bankruptcy Discharge: Should We Reopen Debtors' Prison?* 10 Crim. Just. 27 (1987); Hennigan, *Criminal Restitution And Bankruptcy Law In The Federal System*, 19 Conn. L. Rev. 89 (1986).

In re Johnson-Allen, 871 F.2d at 428. *See also Ron Pair*, 109 S.Ct. at 1033 (where Congress chose to create a tension between principles of federalism and supremacy, there is no reason to suspect that Congress did not mean what the language of the statute says).

Here, as in *Ron Pair*, the language of the Code, specifically § 101(4), (11) and § 1328(a), is as plain as it can be and the legislative history is completely consistent. There is no reason to suspect that Congress did not mean that a restitution obligation was a dischargeable debt under § 1328(a).

Those who believe a different balance should be struck between the competing interests must address their concern to Congress, not this Court. This Court's "task is to apply the text, not to improve upon it." *Pavelic & Leflore* v. *Marvel Entertainment Group*, 58 U.S.L.W. 4038, 4039 (U.S. Dec. 5, 1989).

IV. CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES INVOLVED

(In Addition To Those Contained In The Petition For A Writ Of Certiorari)

United States Constitution, article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien

secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title:

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker,

financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of

the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization
pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a

preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstance, may recover punitive damages.

11 U.S.C. § 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

18 U.S.C. § 3613. Civil remedies for satisfaction of an unpaid fine

(a) **Lien.**—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine

(b) **Expiration of lien.**—A lien becomes unenforceable and liability to pay a fine expires—

(1) twenty years after the entry of the judgment; or

(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

(c) **Application of other lien provisions.**—The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338

through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

(d) **Effect of notice of lien.**—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A) and by subsection (c).

(e) **Alternative enforcement.**—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b).

(f) **Discharge of debts inapplicable**—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

Supreme Court, U.S.
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NO. 89-156
IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners
v.
EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. RESPONDENTS HAVE NOT DEMONSTRATED A CLEAR CONGRESSIONAL INTENT TO INTERFERE WITH THE STATES' CRIMINAL JUSTICE SYSTEMS.

Rather than demonstrating a clear Congressional intent to make criminal sanctions "debts" under the Bankrutpcy Code, respondents have further demonstrated the ambiguity which clouds that intent. Respondents have cited a number of cases standing for the proposition that civil fines, penalties and forfeitures were not provable or dischargeable under the prior Bankruptcy Act. Brief of Respondents at 26, n. 18. They then posit that Section 523(a)(7) of the Bankruptcy Code pertaining to exceptions from discharge in Chapter 7 cases represents Congress' codification of the prior exclusion of fines and penalties, both civil and criminal, and state that nothing in the

text of the provision or its "sparse legislative history" suggests that Congress "intended to differentiate" between civil and criminal fines. Brief at 27.

Respondents' assertion thus demonstrates that instead of expressing a clear Congressional intent that criminal penalties be considered debts, Section 523(a)(7), upon which they rely, is, at least, ambiguous. The language of Section 523(a)(7) could easily be read to refer to <u>civil</u> fines, penalties, and forfeitures which respondents argue were non-dischargeable under the prior law. This does not then clearly indicate, even by implication, that criminal fines are to be considered "debts" under the Code. Respondents' own argument now shows that the text of Section 523(a)(7) can refer to civil, not criminal obligations. This means

that Section 523(a)(7) was not necessarily the focus of Congressional attention as to criminal fines. It also means that, read to apply to civil penalties, the language of Section 523(a)(7) is not superfluous even if criminal penalties are not "debts." The "clear intent" rule used by the Court to determine whether Congress has altered prior law in areas touching on important state and federal concerns is not met. Criminal restitution orders are not "debts" under the Bankruptcy Code.

II. PETITIONERS' CONSTRUCTION DOES NOT UNDERMINE BANKRUPTCY POLICY.

Because there is no clear expression that Congress intended to interfere with the states' criminal justice systems via the Bankruptcy Code, the Court should not concern itself with respondents' arguments that the result of reversal would circumvent "bankruptcy policy," grant petitioners a sort of super-priority status to which they are not entitled under the Bankruptcy Code, or amount to an overreaction to a perceived danger of abuse. Respondents' brief at 37-43. The proper focus of the inquiry is whether Congress meant for criminal restitution orders to be included within the scope of bankruptcy policy in the first place. Notwithstanding the general policies Congress intended to promote by enacting the Bankruptcy

Code, if it did not also clearly express its intention that criminal restitution orders be considered debts, then a debtor's obligation pursuant to these criminal orders cannot be adjusted through bankruptcy proceedings. The issue is predominantly one of statutory construction. If the obligation owed them is not a "debt," then petitioners are entitled to have the obligation remain intact, as set forth by a state court of competent jurisdiction, despite a discharge by the bankruptcy court.[1]

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[1]Respondents suggest that this result excludes from participation in Chapter 13 debtors who otherwise could adjust all of their debts, including restitution claims, in full. This is not a realistic suggestion. In discussing the likelihood of restitution

(FOOTNOTE CONTINUED ON NEXT PAGE)

Even if relevant, respondents' assumption that outstanding restitution obligations, if not considered debts, will necessarily divest the debtor's estate of funds which could otherwise be distributed to creditors and will seriously interfere with the efficacy of Chapter 13 proceedings is not correct.[2]

(FOOTNOTE CONTINUED)

obligations being paid under a Chapter 13 plan, a bankruptcy judge in In re Kohr, 82 B.R. 706 (Bankr. M.D.Pa. 1988) observed that "[t]he majority of Chapter 13 cases are filed to save the home. Most provide very small payments to unsecured creditors. I have approved plans with no payments going to unsecured creditors." Id. at 712. The Chapter 13 plan in this case called for $120 to be distributed among all creditors, including the Department of Public Welfare. Joint App. at 20a-25a. The restitution obligation was $4,144.80.

[2]Respondents also suggest that the enforcement of criminal monetary sanctions will have the effect of

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

thwarting Congressional policy that payments to crime victims receive priority over unpaid fines. They cite a page from the legislative history of the Victim and Witness Protection Act to stand for this proposition. The reference cited by respondents expresses a congressional concern that restitution be restored to priority status under federal law. The Senate Report recognized that "[t]he principle of restitution is an integral part of virtually every form of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." S.Rep. No. 532, 97th Cong., 2d Sess. 30, reprinted in 1982 U.S. Code Cong. & Admin. News 2536. It is difficult to see how excluding criminal restitution orders from the scope of the Bankruptcy Code, the result here urged by petitioners, could defeat this policy or prejudice the rights of crime victims. To the contrary, it is logical to assume that judges will be more inclined to order restitution if they know their orders will not be negated by bankruptcy proceedings. Encouraging courts to enter restitution orders more frequently will have a salutary effect on crime victims' rights, and is consonant with the policy underlying the Victim & Witness Protection Act.

If a debtor defaults on a restitution obligation, the Pennsylvania court, as it did here, would in the ordinary course schedule a hearing to determine the reasons for non-compliance. If the reason for default were the pendency of Chapter 13 proceedings, the sentencing judge would have other options available for consideration; the judge could (1) reduce the payments in accomodation to a Chapter 13 proceeding, (2) extend the payments over a longer period, or (3) defer any further action until the bankruptcy proceedings were completed. Thus, although the possibility of conflict exists, under Pennsylvania procedures a judge would have the opportunity to consider the effect of pending Chapter 13 proceedings before any action might be taken against a

defaulting debtor. Respondents effectively suggest that determinations concerning the adjustment of criminal sanctions are best left to the bankruptcy courts, rather than to the criminal courts which imposed them. This odd suggestion is not warranted by a proper construction of the Bankruptcy Code, nor does it square with the deference the Court has always accorded states in the administration of their criminal laws. Younger v. Harris, 401 U.S. 37 (1971).

CONCLUSION

For the foregoing reasons, as well as those stated in petitioners' principal brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 89-156

In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, ET AL., PETITIONERS

v.

EDWARD J. AND DEBORA A. DAVENPORT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an obligation to pay restitution imposed as part of a criminal sentence is a "debt" within the meaning of the Bankruptcy Code, 11 U.S.C. 101(11), and is therefore dischargeable under Chapter 13 of the Code.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-156

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, ET AL., PETITIONERS

v.

EDWARD J. AND DEBORA A. DAVENPORT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether an obligation to pay restitution imposed as part of a criminal sentence constitutes a "debt" for purposes of the Bankruptcy Code—and is therefore dischargeable under Chapter 13 of the Code. Orders to pay restitution are frequently included in federal criminal sentences. Under the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1253-1255, and the Sentencing Reform Act of 1984, a federal sentencing court must consider, among other factors, "the need to provide restitution to any victims of the offense." 18 U.S.C. 3553(a)(7). Moreover, if the court decides to order less than complete restitution, it must include a statement of its reasons. 18 U.S.C. 3553(c). The United States is empowered to collect restitution imposed

in criminal proceedings. 18 U.S.C. 3663(h). The decision in this case could affect the enforceability of sanctions that Congress has directed federal courts to impose for violations of federal criminal law.

In addition, agencies of the United States that have been victimized by crimes are frequently the beneficiaries of restitution orders. For example, sentences imposed on individuals whose criminal acts have imposed losses on federally insured banks and thrift institutions have often required defendants to make restitution to the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation (which has now been consolidated into the FDIC).[1] In many cases, the defendants are white-collar defendants who, though insolvent at the conclusion of their criminal proceedings, have prospects for substantial future income. In order to preserve the deterrent, rehabilitative, and compensatory purposes of restitution orders, the FDIC and similarly situated federal agencies have a strong interest in assuring that defendants against whom such orders are imposed cannot employ bankruptcy proceedings to avoid serving their sentences.

STATEMENT

1. Many individual debtors have a choice among several forms of bankruptcy, two of which are relevant to this case. Under Chapter 7, a trustee in bankruptcy takes possession of the debtor's estate, 11 U.S.C. 541, and pays claims against the debtor in the order of their priority, 11 U.S.C. 726. The debtor is discharged from all debts that

[1] As of June 30, 1988, there were an estimated 7,350 open FBI and grand jury investigations involving fraud and misconduct against banking institutions. H.R. Rep. No. 1088, 100th Cong., 2d Sess. 10 (1988).

arose prior to the filing of the bankruptcy petition, 11 U.S.C. 727, with the exception of ten enumerated categories, 11 U.S.C. 523(a). One of those exceptions covers any debt (11 U.S.C. 523(a)(7))

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss * * *.

Under Chapter 13, debtors who have regular income and whose secured and unsecured debts do not exceed $350,000 and $100,000 respectively, 11 U.S.C. 109(e), may file a plan under which they undertake to make regular payments to their creditors from future income, 11 U.S.C. 1322. Except as otherwise provided by a plan, debtors in Chapter 13 retain possession of their assets, 11 U.S.C. 1306(b). If and when they complete payments due under their plan, Chapter 13 debtors receive a discharge of all debts except for alimony and child support and certain long-term debts. 11 U.S.C. 1328(a); see 11 U.S.C. 523(a)(5), 1322(b)(5).

Under either Chapter 7 or Chapter 13, a discharge releases only those obligations that fall within the Code's definition of "debt." Section 101(11) provides that " 'debt' means liability on a claim." The term "claim" is defined as a (11 U.S.C. 101(4))

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]

A "creditor" is a person who has a "claim" against the debtor. The interpretation of these related definitions determines not only the scope of a discharge in bankruptcy, but also the applicability of many of the Code's other provisions.

2. In *Kelly* v. *Robinson*, 479 U.S. 36 (1986), this Court discussed, but did not finally resolve, the question whether a criminal sentence requiring a defendant to pay restitution creates a "debt" subject to the Bankruptcy Code. In *Kelly*, an individual had been ordered, as a condition of probation, to repay amounts she had obtained through welfare fraud. After receiving a discharge under Chapter 7, she sought a determination that the restitution obligation constituted a "debt" within the scope of the discharge. This Court found that Congress had "enacted the [Bankruptcy] Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders," *id.* at 46, and that "...e basis for this judicial exception [was] a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," *id.* at 47. Accordingly, the Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." *Id.* at 50. The Court found it unnecessary, however, to resolve that question, since it concluded that Section 523(a)(7) preserved the debtor's obligation to pay restitution, even if the obligation was considered a debt under the Code.

3. This case involves debtors who received a discharge under Chapter 13, specifically Section 1328(a). Section 523(a)(7)—the provision at issue in the Chapter 7 proceedings in *Kelly*—is inapplicable here. The case thus presents the question the Court reserved in *Kelly*.

a. In 1985, after pleading guilty to welfare fraud in state criminal proceedings, respondents Edward and

Debora Davenport were each sentenced to one year of probation, and were ordered to pay $208 per month in restitution until they had paid a total of $2,072.40. Payments were to be made to petitioner Bucks County, Pennsylvania, Probation Department, which in turn was to forward the payments to petitioner Pennsylvania Department of Public Welfare, the victim of the welfare fraud. Pet. App. 5a.

In May 1987, respondents filed a voluntary petition under Chapter 13 of the Bankruptcy Code. They listed the restitution obligation among their unsecured debts; under their plan, that obligation and their unsecured debts were to receive equal treatment. The bankruptcy court approved the plan, and respondents completed their payments under the plan in about a year. In July 1988, respondents received a discharge under 11 U.S.C. 1328(a). Pet. App. 5a-8a.

In the meantime, when respondents failed to make scheduled restitution payments in accordance with their criminal sentences, the Bucks County Probation Department commenced violation of probation proceedings. In response, respondents initiated an adversary proceeding in the bankruptcy court in which they sought a declaration that their restitution obligation was dischargeable. Pet. App. 6a. The bankruptcy court held that the restitution obligation was a "debt" dischargeable under Chapter 13. *Id.* at 68a-104a. On appeal, the district court reversed; it found the reasoning of *Kelly* v. *Robinson*, *supra*, controlling on that question. Pet. App. 59a-66a.

b. A divided panel of the court of appeals reversed, holding that the restitution obligation had been discharged. Pet. App. 1a-58a.[2] The majority noted that most

[2] In the court of appeals, respondents' appeal was consolidated with two other appeals presenting the same question. The court found,

pertinent bankruptcy court decisions had concluded that restitution obligations were not "debts" within the meaning of the Code, and acknowledged that "facially there is considerable merit to [the] arguments" on which those decisions were based. *Id.* at 17a, 19a. Nevertheless, the majority felt "constrained to disagree with the ultimate conclusion that the restitution obligation is not a debt under the Code." *Id.* at 19a.

Beginning with the statutory language, the majority rejected the State's contention that a criminal restitution order does not create a "debt" because it is not enforceable by the victim. Pet. App. 19a-26a. The majority concluded "that because the debtors here have incurred a very real obligation to which the Probation Department holds a right to payment within the meaning of section 101(4) of the Code, that obligation constitutes a 'debt' under the Code." *Id.* at 26a. The State's interpretation, the majority added, would lead to the "anomalous" or "incredible" result that the victim could not participate in payments under a debtor's Chapter 13 plan. *Id.* at 23a, 26a.

Neither of the concerns on which this Court had relied in *Kelly*, the majority continued, "alter[ed] the conclusion that a restitution obligation is a debt." Pet. App. 27a. Noting that in *Kelly* this Court had held that Section 523(a)(7) codified those concerns, the majority reasoned that "Congress must have recognized that such obligations were debts within the meaning of the Code." Pet. App. 29a. The majority stated that Section 523(a)(7) "logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such penalties are debts despite the underlying motivations of

however, that the question was not ripe for review in the other cases, since the debtors had neither completed their plans nor, for that reason, received a discharge under Section 1328(a). Pet. App. 12a-13a.

punishment and rehabilitation." Pet. App. 30a; see also *id.* at 35a-36a.

The majority found further support for its conclusion in "Congress' objective of encouraging debtors to select the repayment option available under Chapter 13." Pet. App. 31a. If restitution obligations were not part of a Chapter 13 plan, the majority explained, then creditors would be reluctant to approve it, making Chapter 13 entirely unavailable to some debtors – a result "contrary to Congress' objective of expanding the availability of the Chapter 13 option." *Id.* at 33a.

Finally, the majority declined to recognize an implied exception for criminal sanctions to a Chapter 13 discharge. The majority explained that Congress "has codified the criminal penalties exception to discharge and has chosen not to apply the exception to Chapter 13 bankrupte[ies]." Pet. App. 40a.

Judge Hutchinson dissented. Relying on *Kelly*'s reasoning, he would have found that the history of noninterference with criminal judgments in bankruptcy proceedings and the policy against federal intrusion on state criminal proceedings required the conclusion that criminal penalties were not "debts" within the meaning of the Bankruptcy Code. Pet. App. 43a-58a.[1]

[1] As the court of appeals noted, the courts have divided, both before and after *Kelly*, on the issue whether criminal penalties – including restitution orders – are "debts" within the meaning of the Bankruptcy Code. Compare *In re Norman*, 95 Bankr. 771 (Bankr. D. Colo. 1989); *In re Ferris*, 93 Bankr. 729 (Bankr. D. Colo. 1988); *In re Kohr*, 82 Bankr. 706, 709-712 (Bankr. M.D. Pa. 1988); *In re Oslager*, 46 Bankr. 58 (Bankr. M.D. Pa. 1985); *In re Vik*, 45 Bankr. 64, 66-68 (Bankr. N.D. Iowa 1984); *In re Pellegrino*, 42 Bankr. 129, 132-135 (Bankr. D. Conn. 1984); *In re Jacobson*, 35 Bankr. 40 (Bankr. D. Ariz. 1983); *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983); *In re Magnuson*, 21 Bankr. 800 (Bankr. D. Ariz. 1982); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981), with *In re Robinson*, 776 F.2d

SUMMARY OF ARGUMENT

In *Kelly* v. *Robinson*, *supra*, the Court stopped short of holding that an obligation to pay restitution imposed as part of a criminal sentence is not a "debt" within the meaning of the Bankruptcy Code. The principles of statutory interpretation on which the Court relied in *Kelly* now justify that step.

A. Viewed as a whole, the Bankruptcy Code strongly suggests that Congress did not intend for state and federal criminal penalties to be administered within the bankruptcy system. The Code exempts from the automatic stay the "commencement or continuation of a criminal action against the debtor." 11 U.S.C. 362(b)(1). This provision, designed to prevent criminal offenders from using bankruptcy as a haven, permits state and federal authorities to take a variety of steps to collect criminal monetary penalties while bankruptcy proceedings are pending. In the face of this clear indication that Congress intended criminal proceedings to go forward without interference from bankruptcy courts, treating criminal penalties as "debts" would have a number of anomalous consequences. The Code could be construed to treat criminal fines or restitution paid on the eve of bankruptcy as preferential

30 (2d Cir. 1985), rev'd on other grounds, 479 U.S. 36 (1986); *In re Hecmy*, 78 Bankr. 246 (Bankr. 9th Cir. 1987), rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988); *Price* v. *Multnomah County District Attorney's Office Victim Assistance Programs*, C.V. No. 89-307-PA (D. Ore. June 14, 1989), appeal pending, No. 89-35482 (9th Cir.); *In re Cancel*, 85 Bankr. 677 (N.D.N.Y. 1988); *In re Wisconsin Barge Lines, Inc.*, 91 Bankr. 65, 67-68 (Bankr. E.D. Mo. 1988); *In re Hackney*, 83 Bankr. 20, 23 (Bankr. N.D. Cal. 1988); *In re Colliens*, 77 Bankr. 825 (Bankr. D. Colo. 1987); *In re Gilliam*, 67 Bankr. 83, 85-87 (Bankr. M.D. Tenn. 1986); *In re Vandrover*, 61 Bankr. 191, 194-196 (Bankr. D.N.D. 1986); *In re Brown*, 39 Bankr. 820, 821-826 (Bankr. M.D. Tenn. 1984); *In re Young*, 10 Bankr. 17 (Bankr. S.D. Cal. 1980).

transfers avoidable by the bankruptcy trustee. 11 U.S.C. 547. Criminal judgments would be assigned a priority near the bottom of all claims that may be satisfied from the debtor's estate, behind even late-filed unsecured claims, and ahead of only post-petition interest and the debtor himself. 11 U.S.C. 726(a). Liens to secure criminal penalties that States and the federal government are expressly permitted to create and enforce under Section 362 would be invalidated under Section 724(a). And criminal sentences would be discharged for some categories of corporate and individual debtors, but not for others. See 11 U.S.C. 523, 727, 1141(d), 1328(a). Those anomalies cannot fairly be attributed to Congress, and they would be eliminated entirely if criminal penalties were excluded from the definition of "debt."

B. Removing criminal penalties from the bankruptcy system would also carry forward the approach to those obligations that prevailed prior to the Bankruptcy Code's enactment. As the Court noted in *Kelly*, 479 U.S. at 46, there existed "an established judicial exception to discharge for criminal sentences, including restitution orders." In other respects as well, the results flowing from excluding criminal penalties from the definition of "debt" would conform to the handling of those obligations under pre-Code law. Congress should not lightly be deemed to have departed from that traditional approach; moreover, in view of this long history, it would by no means be "anomalous" or "incredible," as the court of appeals suggested, to exclude criminal penalties from the bankruptcy scheme.

C. Interpreting the Code's definition of "debt" to include criminal penalties would also foster federal interference with state criminal proceedings. Experience with that construction of the Code demonstrates that it leads inevitably to orders invalidating criminal sentences

and restraining state authorities and courts. That interpretation thus flies in the teeth of "the fundamental policy against federal interference with state criminal prosecutions." *Younger* v. *Harris*, 401 U.S. 37, 46 (1971). Similarly, construing the Code to permit the discharge of federal criminal restitution orders would undercut well-established federal sentencing policy. In the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1253-1255, and various provisions of the Sentencing Reform Act, 18 U.S.C. 3553, 3663, 3664, Congress specifically conferred on restitution the high priority in the federal system that it has long enjoyed in other criminal justice systems. Federal judges are now required to consider restitution whenever they sentence a defendant, and to provide their reasons if they decide not to impose that sanction. In our view, the Bankruptcy Code should not be interpreted to permit criminal defendants to discharge penalties that Congress has expressly decided are necessary to vindicate the punitive, deterrent, and rehabilitative purposes of federal criminal law.

ARGUMENT

In *Kelly* v. *Robinson, supra,* the Court outlined the principles of statutory interpretation that should guide the resolution of this case. As this Court acknowledged, "the Code's definition of 'debt' is broadly drafted, and * * * the legislative history, as well as the Code's various priority and dischargeability provisions, supports a broad reading of the definition." 479 U.S. at 50 n.12. However, the Court observed that "[c]ourts traditionally have been reluctant to interpret federal bankruptcy statutes to remit state criminal judgments," even when that might have been the "most natural construction" of those provisions." *Id.* at 44. The Court added that "nothing in the legislative

history * * * compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." *Id.* at 50 n.12.

Thus, as in *Kelly,* it is necessary to "look to the provisions of the whole law" and to consider the statutory text "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." 479 U.S. at 43-44. Moreover, as in *Kelly,* this case calls for application of a principle of statutory construction that the Court has followed "with particular care" in the bankruptcy context—the rule that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Id.* at 47 (quoting *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection,* 474 U.S. 494, 501 (1986)). See *United States* v. *Ron Pair Enterprises, Inc.,* 109 S. Ct. 1026, 1031-1033 (1989).

These principles require the step that the Court found it unnecessary to take in *Kelly* v. *Robinson.* From the perspective of "the provisions of the whole law," accepting respondents' far-reaching interpretation of "claim" and "debt" would create severe anomalies; in contrast, the interpretation that we urge (and that Judge Hutchinson embraced in dissent below) would give the Code coherence and preserve well-established limitations on the powers of bankruptcy courts. Those limitations are not only of historical significance; in addition, they serve to avoid interference with state criminal proceedings and to safeguard important federal policies to which Congress has given additional emphasis in recent sentencing legislation.

A. When Viewed as a Whole, the Bankruptcy Code Compels the Conclusion that Criminal Penalties Are Not Debts

The focus of this case is on the dischargeability of criminal sanctions. However, the definitions of "debt,"

"claim," and "creditor" are integral to the application of the entire Code, and thus a proper interpretation of "debt" should take account of its effect on the statute as a whole. As we show below, our interpretation (excluding criminal monetary penalties from the "debts" administered under the Code) is consistent with a number of the Code's fundamental features—the scope of the automatic stay, the trustee's power to avoid preferential transfers, and the Code's scheme of priorities, as well as the discharge provisions that the Court examined in *Kelly*. By contrast, respondents' interpretation leads to anomalous and contradictory results.

1. *The Automatic Stay.*—Upon the filing of a bankruptcy petition, Section 362(a) of the Code, 11 U.S.C. 362(a), provides for a very broad stay of proceedings against the debtor and his property. This stay prohibits, among other things, the commencement or continuation of any action or proceeding against the debtor, the enforcement of any judgment against the debtor or his property, any efforts to take possession of the debtor's property, the creation, perfection, or enforcement of any liens against the debtor's property, and "any act to collect, assess, or recover a claim against the debtor that arose" before the bankruptcy petition was filed. 11 U.S.C. 362(a)(1)-(6). As the Senate Report accompanying the Code explained (S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978) [hereinafter *Senate Report*]):

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Significantly, however, Congress specifically provided that debtors are not to be excused from any criminal proceedings. Section 362(b)(1) carves out an exception to the automatic stay for "the commencement or continuation of a criminal action or proceeding against the debtor."[4] This exception extends to all categories of proceedings enumerated in Section 362(a). This provision thus allows federal and state governments not only to prosecute a debtor, but to pursue all available means of collecting monetary penalties, including restitution, imposed as part of a criminal sentence.[5]

In this respect, the exception to the automatic stay for criminal proceedings is broader than the exceptions for civil proceedings through which federal and state governments may exercise their police and regulatory powers. Most notably, those exceptions do not allow collection of money judgments through a variety of means—enumerated in Section 362(a)(2)-(6)—that are permitted in the criminal context. See 11 U.S.C. 362(b)(4)-(5). The Senate

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[4] Cf. *Ohio* v. *Kovacs*, 469 U.S. 274, 284 (1985) (noting availability of criminal penalties against debtor in bankruptcy).

[5] *134 Baker St., Inc.* v. *Georgia*, 47 Bankr. 379 (N.D. Ga. 1984); *United States* v. *Troxler Hosiery Co., Inc.*, 41 Bankr. 457 (D.N.C. 1984) (fine for criminal contempt), aff'd, 796 F.2d 723 (4th Cir. 1986), cert. denied, 480 U.S. 930 (1987); *In re Kohr*, 82 Bankr. 706 (Bankr. M.D. Pa. 1988); *In re Mead*, 41 Bankr. 838, 841 (Bankr. D. Conn. 1984) (criminal restitution); *In re Pellegrino*, 42 Bankr. 129, 135-136 (Bankr. D. Conn. 1984) (same); *In re Vik*, 45 Bankr. 64, 65-66 (Bankr. N.D. Iowa 1984) (same). Contra, *In re Landstrom Distributors, Inc.*, 55 Bankr. 390 (Bankr. C.D. Cal. 1985); *In re Blair*, 62 Bankr. 650 (Bankr. N.D. Ala. 1986).

As the *Troxler* court stressed, proceedings to collect criminal penalties must be considered part of the "continuation" of a criminal proceeding, since "[a] criminal sentence without accompanying authority to ensure service by the defendant as ordered would be meaningless." 41 Bankr. at 460.

Report explained the basis for the broad exception for criminal proceedings as follows (*Senate Report* 51):

> The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

Accord, H.R. Rep. No. 595, 95th Cong., 1st Sess. 342 (1977) [hereinafter *House Report*]; 2 *Collier on Bankruptcy* ¶ 362.05[1] (15th ed. 1989).

The scope of the exception to the automatic stay and its underlying rationale provide strong support for an interpretation of the Code that would remove criminal penalties from the bankruptcy system. As a number of bankruptcy court decisions have noted (see note 5, *supra*), it would be inherently contradictory for the Code to allow enforcement of criminal penalties to go forward without interference from bankruptcy proceedings while at the same time requiring those penalties to be administered along with civil debts in the very same proceedings.

2. *Preferences.*—A "prime bankruptcy policy" is "equality of distribution among creditors of the debtor." *House Report* 178; see 4 *Collier on Bankruptcy* ¶ 547.01, at 547-11 & n.18 (15th ed. 1989). In keeping with that policy, the trustee in bankruptcy is generally empowered to avoid any preferential transfer of an insolvent debtor's property occurring within 90 days of the filing of a petition that is (11 U.S.C. 547(b) (emphasis added)):

> (1) to or for the benefit of a *creditor*; [and]
>
> (2) for or on account of an antecedent *debt* owed by the debtor before such transfer was made * * *.

If a criminal fine or restitution order is a "debt" and the governmental authority responsible for collection is a "creditor," this provision would seem to require States and the federal government to refund fines collected from in-

solvent debtors within the 90 days prior to the filing of their bankruptcy petitions. One bankruptcy court has so held. *In re Hackney*, 83 Bankr. 20 (Bankr. N.D. Cal. 1988) (payment in compliance with criminal restitution order was preference avoidable by bankruptcy trustee).

However, in view of the exception to the automatic stay discussed above, it is clear that Congress could not have intended that payments against criminal fines would be preferences. Section 362(b)(1) expressly authorizes state and federal authorities to collect criminal monetary penalties even *after* a bankruptcy petition has been filed. It is singularly unlikely that the Legislature also intended that authorities who collect a fine or restitution on the eve of a defendant's bankruptcy must return the payment. This absurd result, which does not exist if criminal penalties do not constitute "debts," should not be attributed to Congress.

3. *Priorities.*—Section 726 of the Code establishes the order in which categories of "claims" are satisfied from the debtor's estate in a Chapter 7 bankruptcy. It also provides the framework against which Chapter 13 plans are evaluated; under Section 1325(a)(4), a plan must provide each unsecured creditor with value, as of the effective date of the plan, no less than the creditor would receive under Chapter 7. Section 726(a)(4) assigns a very low priority to any pre-petition claim, "whether secured or unsecured," for (11 U.S.C. 726(a)(4))

> any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, * * * to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim.

The only claims against a debtor with lower priority are those for post-petition interest; claims for "fines, penalties, and forfeitures" are beneath even untimely unsecured claims, see 11 U.S.C. 726(a)(3). In fact, the

Code subordinates even *secured* claims for these fines, penalties, and forfeitures, and it empowers the bankruptcy trustee to avoid any lien that corresponds to a claim of that kind, 11 U.S.C. 724(a) (trustee may avoid liens securing "a claim of a kind specified in Section 726(a)(4)"). If criminal penalties are "debts", that is the priority they would appear to receive under the Code.

That understanding of the Code's application to criminal sanctions is no more plausible in this context than in the context of preferences. At the outset, it is doubtful that Congress would have given state and federal criminal judgments no greater priority than this. Moreover, the exception to the automatic stay for criminal proceedings specifically allows "any act to create, perfect, or enforce any lien against property of the [debtor's] estate" and "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of" the bankruptcy proceeding. 11 U.S.C. 362(a)(4)-(5).[6] Under respondents' view, therefore, Congress must be deemed to have given a trustee the power in Chapter 7 proceedings, under Section 724(a), to avoid the very liens that the exception to the automatic stay permits state and federal governments to create, perfect, and enforce while bankruptcy proceedings are pending. Once again, excluding criminal penalties from the definition of "debt" eliminates the problem altogether.

That interpretation also mitigates the incongruity of the low priority given to "any fine, penalty, or forfeiture * * *

[6] Under 18 U.S.C. 3613(a), which is incorporated as to restitution in 18 U.S.C. 3663(h), a fine creates a lien "in favor of the United States upon all property belonging to the person fined." That lien—and the underlying liability—are protected from discharge in bankruptcy as to fines. 18 U.S.C. 3613(f). The applicability of Section 3613(f) to federal restitution obligations, and liens securing them, has yet to be settled.

that [is] not compensation for pecuniary loss" under Section 726. If viewed in isolation, that category might be read to refer to criminal fines and restitution orders. However, Section 726 does not purport to confer the status of a "debt" on any obligation. Further, in view of the results that flow from that construction, it is more plausible to conclude that Congress intended that this section would apply only to *civil* fines, penalties and forfeitures—and not to *criminal* sentences.[7] That interpretation would also be consistent with the preferred position that Section 362 gives criminal, as opposed to civil, enforcement proceedings and the fact that fines, penalties, and forfeitures are grouped in Section 726 with "multiple, exemplary, and punitive damages," remedies that are civil in nature.

4. *Dischargeability.*—The court of appeals placed heavy reliance on Section 523(a)(7), which exempts from certain discharges a category of fines, penalties, and forfeitures that is nearly the same as the one encompassed by Section 726(a)(4). In the court of appeals' view, Section 523(a)(7) indicates that Congress included all civil and criminal fines and penalties within the Code's definition of "debt" and made a considered decision to discharge criminal penalties under Chapter 7, but not under Chapter 13. For several reasons, that understanding of Section 523(a)(7)'s place in the statutory scheme is untenable.

First, in view of the similarity between the language of this Section and that of Section 726(a)(4), the two provisions should be read *in pari materia.* As demonstrated above, it is implausible to view Section 726(a)(4) as ap-

[7] The reported cases provide examples of those civil sanctions. *In re Carracino,* 53 Bankr. 513 (Bankr. D.N.J. 1985) (civil fines for environmental violations); *In re Daugherty,* 25 Bankr. 158 (Bankr. E.D. Tenn. 1982) (civil penalty for strip mining violation); *In re Tauscher,* 7 Bankr. 918 (Bankr. E.D. Wis. 1981) (civil money penalties for child labor law violations).

plicable to criminal penalties; it is fair to assume that Section 523(a)(7) has no broader scope.

Second, in view of its place in the statute, Section 523(a)(7) does not suggest that any type of obligation is a "debt." Rather, it provides that if an obligation is a debt—a question determined by reference to other sources—then the obligation is nondischargeable "to the extent that" it is a fine, penalty, or forfeiture of the type described.[8] To read Section 523(a)(7) as an indicator of the scope of the definition of "debt" puts the cart before the horse; the definition of "debt" determines the obligations to which Section 523(a)(7) applies, not vice versa.

Finally, understanding Section 523(a)(7) to include criminal monetary penalties, the consequence of considering such penalties to be "debts," creates the same kinds of contradictions that follow that interpretation throughout the Code. As the court of appeals noted, if a criminal fine or restitution order is a "debt," the language of Sections 523(a)(7) and 1328(a) would result in its being discharged in Chapter 7, but not Chapter 13. On its face, the court of appeals' understanding of this result—as an incentive designed to promote use of Chapter 13—is an improbable one. The only debtors who could be influenced by that particular aspect of a discharge under Chapter 13 would be individuals convicted of crimes who had not paid their fines or restitution orders. It is unlikely that Congress

[8] In *Kelly* v. *Robinson*, 479 U.S. at 51, the Court did state that Section 523(a)(7) "codifies the judicially created exception to discharge for fines." However, in view of the "serious doubts" that the Court expressed on the question whether fines were "debts," 479 U.S. at 50, *Kelly* can fairly be read to hold only that to the extent such fines are debts, they would be excluded from discharge under Section 523(a)(7). In view of the "serious doubts" that *Kelly* expressed with respect to respondents' interpretation, that decision obviously cannot be read to have adopted respondents' position.

would have viewed the goal of providing relief to that group as outweighing the state and federal interest in the enforcement of criminal law. Moreover, Congress could not have contemplated that Chapter 13 debtors would be likely to pay a significantly greater proportion of their criminal fines or restitution than those in Chapter 7.[9]

Any doubt on whether Congress intended Section 523(a)(7) to control the dischargeability of criminal penalties is dispelled by an examination of Chapter 11. Under Chapter 11, corporate debtors that reorganize, but not individual debtors, are discharged from the debts described in Section 523(a)(7). 11 U.S.C. 1141(d)(1)(A) and (2). Thus, if the court of appeals' understanding of Section 523(a)(7) is correct, Congress must be deemed to have authorized corporations, but not individuals, to obtain discharges of criminal monetary penalties in Chapter 11 proceedings. See *In re Wisconsin Barge Lines, Inc.*, 91 Bankr. 65, 67-68 (Bankr. E.D. Mo. 1988) (fine imposed on corporation for criminal violations of environmental statutes is a debt dischargeable in a Chapter 11 reorganization proceeding). Since corporations cannot be imprisoned, allowing them to discharge their monetary penalties in reorganization proceedings would effectively undercut the only sanctions that may be imposed for corporate violations of criminal law.

In short, Section 523(a)(7) provides no support for the view that "debts" include criminal penalties. To the con-

[9] As long as no creditor receives less than he would in a Chapter 7 proceeding, 11 U.S.C. 1325(a)(4), there is no requirement that a Chapter 13 plan provide for any level of payments to unsecured creditors. *Deans* v. *O'Donnell*, 692 F.2d 968 (4th Cir. 1982). Very often, the payments to unsecured creditors are minimal. See *In re Kohr*, 82 Bankr. at 712 ("Most [Chapter 13 plans] provide very small payments to unsecured creditors. I have approved plans with no payments going to unsecured creditors.").

trary, in view of that Section's differential application to various forms of bankruptcy, such an interpretation would ascribe to Congress a perverse accommodation between the interests of the bankruptcy system and the interests of state and federal governments in the effective enforcement of criminal law against corporate and individual defendants.

5. *Participation in bankruptcy proceedings by governmental units and victims.* – As the court of appeals noted, if criminal penalties are not "debts," then governmental authorities are not "creditors" with "claims" that may be presented in a bankruptcy proceeding. The court of appeals described that result as "anomalous" and "incredible." Pet. App. 23a, 26a. That assertion overlooks the facts that the automatic stay does not forbid efforts to collect criminal penalties, and that States and the federal government have substantial power to collect criminal penalties outside the bankruptcy system. See 18 U.S.C. 3613, 3663(h). Congress could plausibly have determined that it was unnecessary to extend to these governmental entities the often questionable benefits – and the significant burdens – of participation as "creditors" in bankruptcy proceedings.

* * * * *

This case presents a choice between two fundamentally different views of the relation between the federal bankruptcy system and the criminal justice systems of the States and the federal government. Respondents' view is a contradictory and anomalous one. It posits that, although Congress structured the automatic stay to avoid creating a "haven" for criminals, the Article I Branch nevertheless intended (i) that bankruptcy trustees could require refunds of criminal fines that had been paid on the eve of bankruptcy; (ii) that when the debtor's estate had been

assembled, States and the federal government would be paid the penalties imposed by courts to vindicate the purposes of the criminal law only after all other unsecured creditors had been paid in full, including even unsecured creditors who had not even filed timely claims; and (iii) that, as among corporations and individuals convicted of crimes, individuals in Chapter 13 and corporations in Chapter 11 were to be given more bankruptcy relief from their sentences than similarly situated individuals in Chapters 7 and 11.

By contrast, excluding criminal sentences from the definition of "debt" would result in a coherent accommodation between bankruptcy and criminal law. Under that scheme, governments would continue to employ the traditional remedies that Congress exempted from the automatic stay to collect criminal monetary penalties, and no debtor could use bankruptcy to avoid compliance with a criminal sentence that a court has determined to be appropriate to vindicate the purposes of the criminal law. The "provisions of the whole law," *Kelly* v. *Robinson*, 479 U.S. at 43, fully justify exclusion of criminal penalties from the "debts" administered in the bankruptcy system.

B. Excluding Criminal Penalties from the Definition of "Debt" Would Be Entirely Consistent with Traditional Bankruptcy Principles

The history of the bankruptcy system also lends support to excluding criminal penalties from the definition of "debt." As this Court found in *Kelly* v. *Robinson*, 479 U.S. at 46, courts applying the Bankruptcy Act of 1898 recognized "an established judicial exception to discharge for criminal sentences, including restitution orders."[10] The

[10] See, e.g., *In re Moore*, 111 F. 145 (W.D. Ky. 1901); See also *Zwick* v. *Freeman*, 373 F.2d 110, 116 (2d Cir.), cert. denied, 389 U.S. 835 (1967).

results of the interpretation that we advocate would also conform to bankruptcy law's traditional approach to criminal penalties in a number of other respects.

1. Section 11(a) of the 1898 Act, the predecessor of Section 362 of the Code, did not bar the commencement or continuation of criminal proceedings to collect fines and other criminal monetary relief. Section 11 stayed only each suit "which is founded upon a claim from which a discharge would be a release." Since criminal penalties were not dischargeable, *Kelly* v. *Robinson,* 479 U.S. at 44-46; 1A *Collier on Bankruptcy* ¶ 17.05, at 1587, ¶ 17.13, at 1609-1610 & n.10 (14th ed. 1978), Section 11 did not restrain the enforcement of criminal penalties. *In re Koronosky,* 170 F. 719 (2d Cir. 1909) (enforcement of criminal contempt sanction not stayed by bankruptcy filing); *In re Thomashefsky,* 51 F.2d 1040 (2d Cir. 1931). Allowing governments to enforce criminal penalties outside the bankruptcy system would be consistent with this aspect of pre-Code law.

2. Similarly, Section 60 of the Act, which governed preferences, applied to transfers to "a creditor for or on account of an antecedent debt." Under Section 1(11) of the Act, the term "creditor" included "anyone who owns a debt, demand, or claim provable in bankruptcy." It followed that "a preference [could] be given only where the person benefited [held] a provable claim." 3 *Collier on Bankruptcy* ¶ 60.17, at 834 (14th ed. 1977). The same established line of authority on which the Court relied in *Kelly* v. *Robinson* compels the conclusion that a fine or other criminal penalty was not a debt that could be the subject of a preferential transfer under the 1898 Act.

3. Because criminal fines and restitution orders were not "allowable" debts, governmental authorities to which

payments were due did not participate in a bankrupt's distribution under the 1898 Act. See *United States* v. *Birmingham Trust & Savings Co.,* 258 F. 562, 564 (5th Cir.), cert. denied, 251 U.S. 550 (1919). In the light of that history, it would be neither "anomalous" nor "incredible" (Pet. App. 23a, 26a) to construe the present statute to require the same result.[11]

In short, the consequences that would accompany construing the term "debt" to exclude monetary criminal penalties would be consistent with the treatment that those obligations received under the 1898 Act. The coherent scheme that would result from that interpretation of the Code, see p. 21, *supra,* would be substantially the same scheme that prevailed under pre-Code law.

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[11] The Code did make some changes in the area of civil penalties owed to the government. Except to the extent of any pecuniary loss suffered by a governmental entity, civil penalties were disallowed completely by Section 57j of the 1898 Act. See *Kelly* v. *Robinson,* 479 U.S. at 44; 3 *Collier on Bankruptcy* ¶ 57.22 (14th ed. 1978). Moreover, most courts held that those civil penalties were also not dischargeable, notwithstanding the Bankruptcy Act's silence on that issue. *In re Abramson,* 210 F. 878 (2d Cir. 1914); *Sherwood* v. *United States,* 228 F. Supp. 247 (E.D.N.Y. 1964); 3A *Collier on Bankruptcy* ¶ 63.12 (14th ed. 1978). See *Simonson* v. *Granquist,* 369 U.S. 38 (1962). As is noted above (pp. 15-20, *supra*), Sections 726(a)(4) and 523(a)(7) modify those results somewhat. They provide, respectively, that civil penalties are a low-priority unsecured claim in a bankruptcy proceeding and that they are protected from discharge only in Chapter 7. It is not surprising—or inconsistent with the preservation of the old regime for criminal penalties—that Congress adopted a somewhat different approach to civil penalties than it did to criminal penalties. As we have noted above, the Code draws a comparable distinction between civil and criminal enforcement proceedings for purposes of the automatic stay. And, even under the 1898 Act, there had been disagreement over the proper handling of civil claims. *Kelly* v. *Robinson,* 479 U.S. at 45 n.6. See *Parker* v. *United States,* 153 F.2d 66 (1st Cir. 1946) (civil contempt fine is dischargeable, notwithstanding contrary rule for criminal contempt).

C. Respondents' Interpretation of the Code Would Violate Principles of Federalism and Congressionally Mandated Federal Sentencing Policy

1. In *Kelly* v. *Robinson,* 479 U.S. at 47, the Court noted that a proper interpretation of the Code in this area "must reflect the basis for [the] judicial exception [to dischargeability], a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." Any different approach would contradict the "fundamental policy against federal interference with state criminal proceedings." *Ibid.* (quoting *Younger* v. *Harris,* 401 U.S. at 46).

Experience with the Code demonstrates that the potential for federal-state interference is not limited to Chapter 7 bankruptcies of the type at issue in *Kelly,* or even to disputes over dischargeability. Friction between state authorities and bankruptcy courts inevitably accompanies respondents' interpretation of the statute. Bankruptcy courts that have concluded that criminal penalties are "debts" have enjoined state courts from enforcing fines, *In re Heincy,* 78 Bankr. 246 (Bankr. 9th Cir.), rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988); *In re Cancel,* 85 Bankr. 677 (N.D.N.Y. 1988); have issued injunctions running to state courts and prosecutors to prevent revocation of probation conditioned on the payment of restitution, *In re Cullens,* 77 Bankr. 825 (Bankr. D. Colo. 1987); *In re Brown,* 39 Bankr. 820, 826-830 (Bankr. M.D. Tenn. 1984); and have determined that state authorities must turn over to the bankruptcy trustee money that had been paid in partial satisfaction of a criminal fine, *In re Hackney, supra.* See also *In re Kohr, supra* (debtors sought to have state district justice held in contempt in bankruptcy court for his issuance of an arrest warrant upon debtors' failure to pay a criminal fine).

These cases demonstrate that any attempt to administer criminal sentences together with the fundamentally different civil obligations for which the bankruptcy system is designed is destined to generate conflicts between bankruptcy judges and state courts. The concern for federalism that the Court emphasized in *Kelly* v. *Robinson, supra,* strongly supports an interpretation of the Code that will remove criminal sentences from the bankruptcy system altogether.

2. Established federal sentencing policy provides additional support for the view that restitution orders imposed as part of criminal sentences are not "debts" subject to administration within the federal bankruptcy system. See *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection,* 474 U.S. at 505; *United States* v. *Ron Pair Enterprises, Inc.,* 109 S. Ct. at 1032. Under the Sentencing Reform Act, 18 U.S.C. 3553(a)(7), district courts are required to consider, among other things, "the need to provide restitution to any victims of the offense." There is a presumption in favor of restitution. "If the court does not order restitution, or orders only partial restitution, the court shall include in [the statement of its application of the Sentencing Guidelines to the defendant] the reason therefor." 18 U.S.C. 3553(c). Courts may not impose a fine that would impair the defendant's ability to make restitution, 18 U.S.C. 3572(b); indeed, under the Sentencing Guidelines, any sentence that provides for both a fine and restitution must provide that the restitution will be paid first, United States Sentencing Commission Guidelines Manual § 5E4.1.

These provisions build upon Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1253-1255. The Senate Committee Report accompanying the legislation made clear that its purpose was to give restitution orders a "priority status" in the federal

criminal justice system. S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982). The Report explained (*ibid.*):

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.

Congress reasserted its commitment to criminal restitution in the legislation it enacted to address the crisis facing the Nation's thrift institutions. Section 966 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, authorized an additional $65,000,000 for the Justice Department for each of fiscal years 1990-1992 to pay for investigations and prosecutions for crimes committed against financial institutions. Many members of Congress expressed the hope that these prosecutions would result in criminal sentences requiring individuals who had siphoned funds from insured institutions to make good the losses they had imposed on federal insurers and ultimately the taxpayer.[12]

[12] See 135 Cong. Rec. H2559 (daily ed. June 14, 1989) (remarks of Rep. Wylie) ("[W]e put $75 million in this bill to give to the Justice Department so it can pursue the crooks who stole from the FSLIC fund to line their own pockets. The Justice Department must be encouraged to be vigilant in pursuit of the criminals and work to gain restitution of some of the property fraudulently invested in with depositors' money."); 135 Cong. Rec. S3994 (daily ed. Apr. 17, 1989) (remarks of Sen. Bond) (increased funding will allow the Justice Department "to go out after those individuals who defrauded the system and who looted the system, to track them down and bring them to justice and recover everything we can financially."); 135 Cong. Rec. S4001 (April 17, 1989) (remarks of Senator Bond) ("We cannot, in good conscience, accept the burdens that this bill puts on the taxpayer without actively pursuing every crook who stole from FSLIC with maximum criminal penalties and maximum recovery of ill-gotten gain.").

Significantly, Congress took account of the possibility that restitution could unfairly burden a defendant and specifically addressed that issue in its sentencing statutes. Under 18 U.S.C. 3664, a sentencing court is required to consider "the financial resources of the defendant" and "the financial needs and earning ability of the defendant and the defendant's dependents" when it fixes the amount of an award of restitution. Those awards thus take account of the defendant's ability to pay, and bankruptcy protection is unnecessary to avoid injustice.

Construing the Bankruptcy Code to permit discharge of criminal restitution orders would undercut the accommodations that district courts are required to draw between the needs of victims, the interest of the criminal justice system in deterrence, punishment, and rehabilitation, and the defendant's financial circumstances. As many courts of appeals have agreed, it is entirely consistent with the factors that Congress has required sentencing courts to consider for a court to impose a substantial restitution order on a defendant who lacks assets or is in bankruptcy at the time of sentencing.[13] Particularly in the case of

[13] *United States* v. *Ryan*, 874 F.2d 1052 (5th Cir. 1989); *United States* v. *Sunrhodes*, 831 F.2d 1537, 1546 (10th Cir. 1987); *United States* v. *Parther*, 823 F.2d 965, 970 (6th Cir. 1987); *United States* v. *Atkinson*, 788 F.2d 900, 904 (2d Cir. 1986); *United States* v. *Fountain*, 768 F.2d 790, 802-803 (7th Cir. 1985), modified on other grounds, 777 F.2d 345, cert. denied, 475 U.S. 1124 (1986); *United States* v. *Keith*, 754 F.2d 1388, 1393 (9th Cir.), cert. denied, 474 U.S. 829 (1985).

Moreover, a court may award restitution for a criminal offense even if the civil obligation arising from that crime has been discharged. *United States* v. *Alexander*, 743 F.2d 472, 480 (7th Cir. 1984) ("The 'fresh start' envisioned by the imposition of probation conditions [providing for restitution] is entirely different from the one resulting from discharge in bankruptcy."); *Barnette* v. *Evans*, 673 F.2d 1250 (11th Cir. 1982); *United States* v. *Carson*, 669 F.2d 216 (5th Cir. 1982).

white-collar criminals, such defendants may have substantial future earnings prospects. A restitution award may also be appropriate to deter other individuals from committing similar crimes. Cf. *Kelly* v. *Robinson*, 479 U.S. at 49 n.10 ("the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine"). If a defendant were eligible for Chapter 13, respondents' interpretation of the Code could enable him to discharge the restitution order. The Bankruptcy Code should not be construed to invalidate criminal sentences that Congress has found are necessary to vindicate the purposes of the criminal law.[14]

[14] As was noted above, Congress has provided expressly that federal criminal fines are exempt from discharge under the Bankruptcy Code. 18 U.S.C. 3613(f). The Senate has also passed a bill that, if enacted, would affect the dischargeability of state and federal criminal monetary penalties, among others. On October 5, 1989, and again on November 3, 1989, the Senate passed S. 84, 101st Cong., 1st Sess., a bill entitled the Federal Debt Collection Procedures Act of 1989. In addition to creating a comprehensive scheme of federal law for debts owed to the federal government, the bill would add a subsection to Section 523(a) of the Code that would exempt from discharge any debt (135 Cong. Rec. S13448 (daily ed. Oct. 15, 1989))

> (11) to the extent that such debt arises from a violation by the debtor of a civil or criminal law enforceable by an action by a governmental unit to recover restitution, damages, civil penalties, attorneys fees, costs, or any other relief, or to the extent that such debt arises from an agreed judgment or other agreement by the debtor to pay money or transfer property in settlement of such an action by a governmental unit.

Section 1328 of the Bankruptcy Code would also be amended to make this exception applicable to discharges under Chapter 13. *Ibid.* A somewhat similar bill passed the Senate last year, but was not enacted. S. 1961, 100th Cong., 2d Sess. (1988).

In our view, enactment of this legislation would not eliminate the need for the Court's guidance on whether a criminal penalty creates a "debt." As reflected above, the consequences of that interpretation are felt throughout the Code.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief. This motion

is made necessary by the refusal of Respondents' counsel to provide consent.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the State level of the use of victim impact information. WLF has appeared as *amicus curiae* in a number of cases dealing with victims' rights issues, including *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989).

Rep. Henry J. Hyde has been a member of the United States House of Representatives since 1975 and has been an active supporter of the rights of crime victims. Congressman Hyde served as a member of the House Judiciary Committee when it was considering legislation that ultimately became the Bankruptcy Reform Act of 1978; Congress' intent when it adopted the Act is the issue presented for review by the Court in this case.

The National Organization for Victim Assistance, headquartered in Washington, D.C., is a nationwide organization of victim and witness assistance programs and practitioners, criminal justice agencies and professional, mental health professionals, researchers, former victims, and survivors, and others committed to the recognition and implementation of victim rights. Its goals include providing a voice for victim interests in various branches of government, ensuring that crime victims across the nation are never more than a phone

call away from help, and helping local victim assistance programs expand their skills and services.

The National Victim Center (formerly The Sunny von Bulow National Victim Advocacy Center) is a national, nonprofit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Stephanie Roper Committee is a victims' rights advocacy organization which has proposed legislation responsive to the needs of victims.

The Crime Victims Legal Clinic is a project of the California Center of Victimology, a comprehensive crime victim service agency founded in 1985 based in San Diego, California. Among the goals of the clinic is to provide training to the legal and mental health communities who counsel and treat victims of crime; to reduce the trauma suffered by crime victims, their families, and the community in which they live; and to promote and implement the "Victim Bill of Rights."

Parents of Murdered Children, Inc (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national nonprofit, self-help support organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides

information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family.

The Unity Group, Inc. is a Maryland-based advocacy group for battered women and their children that urges criminal prosecution of the abuser where appropriate, provides assistance to victims, and helps make the law enforcement community and judicial system responsive to the special needs of victims of domestic violence.

The Maryland Coalition Against Crime (MCAC) is an organization based in Baltimore, Maryland that works for enactment of legislation that promotes stronger law enforcement efforts and the rights of crime victims. MCAC currently is seeking adoption of a "Victims' Rights Amendment" to the Mayland Constitution.

All of the above-named *amici* wish to present a broader perspective of the issues in this case in order to assist the Court in its disposition. The parties to this case are two criminal offenders who seek to use federal bankruptcy laws to nullify their obligations to make restitution to the victims of their crimes; and the Commonwealth of Pennsylvania, which prosecuted the criminal offenders and opposes their nullification effort. Noticeably absent from this case is representation for individual citizens who are the victims of crime. *Amici* wish to file their brief in order to provide the Court with the views of crime victims. *Amici* believe that the rights of individuals who are the victims of crime will be substantially harmed if the decision of the court below is affirmed.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of Petitioners be granted.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Are criminal restitution orders dischargeable "debts" in proceedings under Chapter 13 of the Bankruptcy Code?

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NO. 89-156

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, *et al.*,
Petitioners,

v.

EDWARD J. and DEBORA A. DAVENPORT,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, CONGRESSMAN HENRY J. HYDE, THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, THE NATIONAL VICTIM CENTER, THE STEPHANIE ROPER COMMITTEE, THE CRIME VICTIMS LEGAL CLINIC, PARENTS OF MURDERED CHILDREN, THE UNITY GROUP, AND THE MARYLAND COALITION AGAINST CRIME AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The interests of the *amici curiae* are set out fully in the Motion for Leave to file accompanying this brief.

STATEMENT OF THE CASE

The relevant facts are simple and undisputed. Respondents Edward and Debora Davenport pled guilty to the crime of welfare fraud in Bucks County, Pennsylvania Common Pleas Court on September 17, 1985. *See Commonwealth of Pennsylvania v. Johnson-Allen [In re Johnson-Allen]*, 871 F.2d 421, 422 (3d Cir. 1989). Each was sentenced to one year probation and ordered to make criminal restitution payments of $208 per month until a total of $2,072.40 had been paid. *Id.* Payments were to be sent to the court's Adult Probation and Parole Department which, in turn, was to forward them to the agency that the Davenports had defrauded, the Pennsylvania Department of Public Welfare (DPW). *Id.*

The Davenports made none of the required payments and instead, on May 25, 1987, filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code. Their debt-adjustment plan, approved by the bankruptcy court on October 20, 1987, provided that DPW and all other "unsecured creditors" would receive no payments on their claims. *Id.*[1]

[1] Chapter 13 of the Bankruptcy Code serves as an alternative to Chapter 7 liquidation for individuals with regular income who wish to pay off at least a portion of their indebtedness over the course of several years. *See, generally*, 5 *Collier on Bankruptcy* Ch. 1322 (15th ed. 1988). Individuals filing for bankruptcy under Chapter 13 must submit a "plan" to the bankruptcy court whereby they agree to pay all anticipated income not necessary for normal living expenses into the court for a specified period of time (generally three years); the plan specifies all of the individual's debts and how much the individual expects to pay on each of those debts. 11 U.S.C. § 1322. The bankruptcy court will confirm the "plan," provided that the plan meets the requirements of 11 U.S.C. § 1325; principal among those requirements is that unsecured creditors must receive at least as much under the plan as they would have received had the debtor's estate been liquidated immediately under Chapter 7. If the debtor makes all payments required under the plan, he is entitled to a complete discharge (with only a very few exceptions) of all debts provided for in the plan. 11 U.S.C. § 1328.

In the meantime, the Probation Department commenced probation violation proceedings against the Davenports based on their failure to make restitution payments. *Id.* The Davenports thereupon in August 1987 commenced an adversary proceeding in the bankruptcy court, seeking a determination that their criminal restitution obligation had been discharged.

Before the bankruptcy court could rule in the adversary proceeding, the state court held a probation violation hearing in October 1987. *Id.* The state court declined to revoke probation, and it extended the Davenport's repayment period to three years. *Davenport v. Commonwealth of Pennsylvania [In Re Davenport]*, 83 Bankr. 309, 311 (Bankr.E.D.Pa. 1988). The state court nonetheless ruled that the restitution order "still stands." *Id.* Under pressure from the state court, the Davenports began making restitution payments in October 1987. *Id.*

Following trial in the adversary proceeding, the bankruptcy court held that the restitution obligation was dischargeable under Chapter 13. *In re Davenport, supra*, 83 Bankr. 309. The bankruptcy court ordered DPW to turn over to the bankruptcy trustee all payments it had received from the Davenports, to be distributed in accordance with the Davenports' Chapter 13 plan. *Id.* at 317. The Davenports thereafter ceased all further restitution payments. The Davenports completed all payments required under their Chapter 13 plan in July 1988 and, accordingly, the bankruptcy court issued an order pursuant to 11 U.S.C. § 1328 discharging all of their debts.

On appeal of the adversary proceeding, the district court reversed, holding that the restitution obligation was not dischargeable under 11 U.S.C. § 1328 because it was not a "debt" as defined by the Bankruptcy Code. *Davenport v. Commonwealth of Pennsylvania*, 89 Bankr. 428 (E.D.Pa. 1988). The United States Court of Appeals for the Third Circuit, in a 2-1 decision issued in March 1989, reversed and directed the

district court to enter an order affirming the bankruptcy court's initial decision. *In re Johnson-Allen*, *supra*, 871 F.2d 421.[2]

The Third Circuit held that a restitution obligation is a "debt" within the meaning of § 101(11) of the Bankruptcy Code, 11 U.S.C. § 101(11), and is not excepted from the general discharge provided by § 1328. The Third Circuit conceded that this Court held in *Kelly v. Robinson*, 479 U.S. 36 (1986), that restitution obligations were not dischargeable in a Chapter 7 bankruptcy. The Third Circuit distinguished *Kelly*, however, by noting that the Court in *Kelly* did not decide whether a criminal restitution obligation was a "debt" within the meaning of § 101(11) but rather held that § 523(a)(7) of the Code (a provision applicable to Chapter 7 cases but not Chapter 13 cases) prevented discharge. *In re Johnson-Allen*, *supra*, 871 F.2d at 426.

INTRODUCTION AND SUMMARY OF ARGUMENT

The rights of victims of crime -- including the right to be compensated by the criminal for harm caused by his crime, the right to play a meaningful role in the system of justice that must deal with the crime, and the right to comfort and understanding of their plight by society as a whole -- have gained increasing acceptance in this country in recent years. However, the decision under review in this case threatens to set back the victims' rights movement significantly. If the Court upholds the Third Circuit's decison in this case, the Court will send a signal to crime victims everywhere that their rights are less important than the alleged rights of criminal

[2] The Davenports' case was consolidated before the Third Circuit with two other cases involving the identical issue -- whether a criminal convicted of welfare fraud and ordered to make restitution payments may obtain a discharge of the restitution obligation by filing a Chapter 13 bankruptcy petition. The Third Circuit held that those other cases were not yet ripe for review. 871 F.2d at 423. Only the Davenports' case is currently before the Court.

offenders to obtain a fresh start in life unencumbered by debts they brought upon themselves through their criminal conduct. It is not conceivable that that was the choice that Congress made when it enacted the Bankruptcy Reform Act of 1978.

The Third Circuit held in this case that criminal offenders may obtain discharges of their criminal restitution obligations in cases filed under Chapter 13 of the Bankruptcy Code. The Third Circuit arrived at its erroneous decision by focusing its attention on a single provision of the Bankruptcy Code rather than, as this Court has instructed, arriving at a decision by considering the entire Code as well the policies that have underlay federal bankruptcy law throughout our nation's history. Had the Third Circuit focused on all the proper factors, it would have discovered that: (1) Congress expressed strongly through Code § 362(b), 11 U.S.C. § 362(b), its desire that criminal offenders not be permitted to use the bankruptcy laws to escape criminal sanctions; (2) pre-1978 law held that criminal restitution obligations could not be discharged by a bankruptcy court, and there is no evidence that Congress intended to change that law or even considered doing so; and (3) the decision it arrived at violated a fundamental federal policy against federal interference with state criminal prosecutions.

Moreover, legislation enacted by Congress following its adoption of the Bankruptcy Reform Act of 1978 has confirmed that Congress never intended, as the Third Circuit believed, to so strongly favor the rights of indigent criminals over the rights of the victims of their crimes. This subsequent legislation, including the Victim and Witness Protection Act of 1982, contains provisions that are inconsistent with a belief that criminal offenders may obtain relief in bankruptcy from their restitution obligations.

ARGUMENT

I. CONGRESS' INTENT NOT TO PERMIT DISCHARGE OF RESTITUTION OBLIGATIONS UNDER CHAPTER 13 IS EVIDENT WHEN THE BANKRUPTCY CODE IS CONSTRUED AS A WHOLE, ALONG WITH ITS OBJECTS AND POLICIES

A. In Determining Congressional Intent, Court Must Be Guided By Examination of Entire Bankruptcy Code.

The Third Circuit arrived at its conclusion that restitution obligations are dischargeable debts under Chapter 13 of the Bankruptcy Code by focusing exclusively on two provisions of the Code: § 101(11), which defines "debt," and § 101(4), which defines "claim." The Third Circuit reasoned that since Congress intended that those two terms were to be broadly interpreted, Congress must have intended a restitution obligation to be a "debt" within the meaning of the Code. *In re Johnson-Allen*, *supra*, 871 F.2d at 424-25.

In so narrowly focusing its search for Congressional intent, the Third Circuit violated a fundamental precept of statutory construction. As the Court explained in *Kelly*, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, *supra*, 479 U.S. at 43 (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986)). Accordingly, the Court in *Kelly* determined Congressional intent with regard to the dischargeability of restitution obligations in Chapter 7 cases by examining the Bankruptcy Code "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." *Id.* at 43.

The Court should adopt a similar approach in this case. As will be shown below, Congress' intent not to permit bankruptcy proceedings to nullify criminal restitution orders becomes evident if one focuses not solely on the definitional section of the Bankruptcy Code but rather on the entire Code and on the policy factors outlined in *Kelly*.

B. Bankruptcy Code Indicates Congress' Intent to Defer to State Criminal Justice Systems.

A key statutory provision in this case is § 1328 of the Bankruptcy Code, 11 U.S.C. § 1328, which provides that a bankruptcy court "shall" grant to a qualifying Chapter 13 debtor "a discharge of all debts provided for by the plan." In applying § 1328 to this case, one must determinine whether a criminal restitution obligation falls within the category of "debts" subject to the § 1328 discharge. The Third Circuit answered that question by looking to Code § 101(11), which defines "debt" as "liability on a claim." A "claim" in turn is defined very broadly in Code § 101(4) as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

The Third Circuit also cited to legislatve history suggesting that the term "claim" is to be given "the broadest possible definition." *In re Johnson-Allen*, *supra*, 871 F.2d at 424. The Third Circuit concluded that since the terms "debt" and "claim" are so broadly defined, a criminal restitution obligation must be within the class of "debts" discharged in Chapter 13 proceedings by § 1328. *Id.* at 424-25.

1. § 362(b) Demonstrates Congressional Intent.

The Third Circuit's analysis fails to focus on whether Congress intended the discharge provisions of the Code to extend into the criminal sphere. Noticeably absent from the Code's definitions both of "debt" and of "claim," or from the legislative history of those definitional sections, is any indication that Congress intended such an extension. However, Congress' intent with respect to the interplay between the Bankruptcy Code and criminal prosecutions *is* evident in Code § 362, which defines the types of conduct toward a debtor that are automatically stayed by the filing of a bankruptcy petition. Code § 362(b), 11 U.S.C. § 362(b), sets forth 13 types of conduct that are *not* stayed by a bankruptcy filing, including three that are relevant to this case: §§ 362(b)(1), 362(b)(4), and 362(b)(5). Those three provisions provide that a bankruptcy filing is not to stand in the way of state criminal or enforcement actions or of efforts to enforce judgments (other than a money judgment) resulting from enforcement actions.[3] The legislative history of the Bankruptcy Code -- which was enacted in 1978 -- indicates that Congress adopted §§ 362(b)(1), (4),and (5) to make clear that criminals could not use the Code as a shield to protect themselves from punishment for their crimes. *See* H.Rep. No. 595, 95th Cong., 1st Sess. at 342, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6299 ("[t]he bankruptcy laws are not a haven for criminal offenders but are designed to give relief from financial overextensions. Thus, criminal actions and proceedings may proceed in spite of bankruptcy"); S.Rep. No. 989, 95th Cong., 2d Sess. at 51, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5831 (same).

[3] Section 362(b) provides that a bankruptcy filing does not operate as a stay:

> (1) of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> .....
>
> (4) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a government unit to enforce such government unit's police or regulatory power.

The Third Circuit acknowledged the legislative history cited above but argued that that history was relevant only to automatic stay provisions of the Code, not to discharge provisions. To the contrary, the court argued, the absence of similar language in the legislative history surrounding the definitions of "debt" and "claim" was evidence that Congress intended a "debt," for purposes of the § 1328 discharge, to include restitution obligations. *In re Johnson-Allen*, *supra*, 871 F.2d at 427.

In refusing to consider the language and history of § 362(b) in its analysis of Chapter 13 discharges, the Third Circuit failed to heed this Court's admonition in *K lly* that a court's statutory interpretation be guided by an analysis of the *entire* statute at issue. *Kelly*, *supra*, 479 U.S. at 43. The Third Circuit's holding that criminal restitution orders are dischargeable in Chapter 13 proceedings simply cannot be squared with § 362(b). Under the Third Circuit's interpretation of the Code: (1) the automatic bankruptcy stay does not prevent a State from prosecuting a criminal who has filed for bankruptcy, imposing a sentence that includes a restitution order, or holding a hearing to determine whether the criminal has complied with the restitution order; yet (2) Code § 1328 nonetheless supersedes any state court determination that the criminal must make restitution for his crime. Congress could not have intended the Code to lead to such internally inconsistent results, the much more logical interpretation (which is not inconsistent with any explicit language of the Code) is that while Congress intended the term "debt" to be broadly construed and to permit Chapter 13 debtors to obtain a discharge of virtually all of their debts, Congress never

intended the § 1328 discharge to apply to criminal restitution orders.[4]

Moreover, other circuit courts have uniformly held that a criminal court may as part of its sentence require a defendant to make restitution for a debt that was previously discharged in bankruptcy. *See, e.g., United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984); *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982). Respondents concede that *Alexander* and *Carson* were correctly decided and instead attempt to distinguish those cases from this case. Respondents' Opposition to Petition for Writ of Certiorari at 4-5. However, there simply is no principled basis upon which to distinguish the cases; when, as was true in *Alexander* and *Carson* as well as in this case, a debt arising from a defendant's criminal activity has been discharged in bankruptcy, the dischargeability of a restitution order based on that debt should not depend on whether the restitution order was issued before or after the bankruptcy discharge order. Such a rule would merely reward those criminals who have the foresight to delay filing Chapter 13 petitions and to delay seeking discharge of their debts until

[4] The structure of § 362(b) lends strong support to the argument that Congress did not intend to permit Chapter 13 discharge of restitution obligations. Section 362(b)(4) permits enforcement of a jurisdiction's "police and regulatory power" against a debtor, while § 362(b) (5) permits enforcement of a judgment *except a money judgment* obtained as a result of enforcement of such police and regulatory power. Thus, in the context of police and regulatory power, § 362(b)(5) somewhat limits a State's power to act against a debtor: the automatic stay prevents enforcement of money judgments obtained through use of such powers. *See* 124 Cong. Rec. H11,092 (Sept. 28, 1978) (§ 362(b)(4) is to be given a narrow construction so as not to permit a governmental unit "to protect a pecuniary interest" in the debtor's property). However, in the context of a *criminal* action (which § 362 clearly distinguishes from actions to enforce a governmental unit's police or regulatory power), § 362 contains no similar restriction on the power of a State to enforce its criminal sentences. The obvious implication to be drawn from the absence of such a restriction is that Congress did not intend that the Bankruptcy Code would interfere in any way with criminal sentences, whether in the form of incarceration, fines, or restitution orders.

after their sentencing. Nothing in the Code or its legislative history suggests that Congress intended such an absurd result.

2. § 523(a)(7) Does Not Support Respondents' Case.

The Third Circuit cited Bankruptcy Code § 523(a) (7), 11 U.S.C. § 523(a)(7), in support of its argument that restitution obligations are dischargeable in Chapter 13 cases. Section 523(a)(7) exempts from discharge in Chapter 7 cases any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss...." The Third Circuit noted that this Court in *Kelly* held that restitution obligations fit within the category of debts exempted from Chapter 7 discharge by § 523(a)(7); the Third Circuit reasoned, based on that holding, that restitution obligations must be "debts" within the meaning of the Bankruptcy Code and therefore must be dischargeable under § 1328. *In re Johnson-Allen, supra*, 871 F.2d at 426-27.

The Third Circuit's reasoning is based on a serious misreading of *Kelly*. Nothing in *Kelly* suggests that this Court found that a restitution obligation is to be considered a "debt" for all purposes under the Code. To the contrary, the Court explicitly stated in *dicta* that it had "serious doubts about whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)."[5] *Kelly, supra*, 479 U.S. at 50. In light of that *dictum*, *Kelly* cannot fairly be cited in support of an argument that § 523(a)(7) demonstrates Congress' intent to treat restitution obligations as "debts" for all purposes under the Code.

The § 523(a)(7) argument might be persuasive if there were some indication in either the statute's language or its legislative history that Congress had criminal penalties in mind

[5] The reference should have been to § 101(11).

when it drafted the § 523(a)(7) dischargeability exception. But no such indication exists. Section 523(a)(7) certainly has numerous noncriminal applications; governmental units regularly impose *civil* fines, penalties, and forfeitures that are rendered nondischargeable in a Chapter 7 case (but not a Chapter 13 case) by § 523(a)(7). Indeed, what legislative history exists for § 523(a)(7) suggests that Congress was primarily thinking about tax penalties when it adopted that section. *See Kelly*, *supra*, 479 U.S. at 51 n.13. While, as *Kelly* held, the language of § 523(a)(7) may be broad enough to include criminal penalties, the absence of any evidence that Congress had criminal penalties in mind when it adopted that section undercuts any argument that § 523(a)(7) demonstrates a Congressional intent to make restitution obligations nondischargeable in Chapter 7 but dischargeable in Chapter 13.

3. There Is Nothing Anomalous About a Decision That Would Deprive a Restitution Order Beneficiary of Right to Receive Bankruptcy Distribution.

The Third Circuit, noting that only those owed a "debt" by a debtor in bankruptcy may receive distributions from the bankruptcy estate, argues that a holding that a restitution obligation is not a debt for purposes of a § 1328 discharge "would 'produce the anomalous result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distributions of the debtor's assets in liquidation.'" *In re Johnson-Allen*, *supra*, 871 F.2d at 425 (quoting *In re Robinson*, 776 F.2d 30, 35-36 (2d Cir. 1985), *rev'd sub nom Kelly v. Robinson*, 479 U.S. 36 (1986)).

Amici note initially that the Third Circuit's conclusion does not necessary follow from its premise.[6] But even if the Third

[6] The Third Circuit's conclusion is based on an assumption that if Congress intended that a restitution obligation not be considered a "debt" for purposes of the discharge provisions of the Code, it must also have (continued...)

Circuit is correct, *amici* see nothing "anomalous" about a result that would deprive beneficiaries of restitution obligations of a right to participate in a bankruptcy court's distribution of the debtor's assets. For one thing, unsecured creditors receive little or no distribution in a typical Chapter 13 bankruptcy. *See Kohr v. Magisterial District 52-1-01 [In re Kohr]*, 82 Bankr. 706, 712 (Bankr.M.D.Pa. 1988). Thus, being deprived of the right to participate in the distribution is not much of a hardship.[7]

Moreover, there is reason to believe that Congress intended that bankrupt criminals be required to pay criminal penalties from exempt property or future earnings rather than from the bankruptcy estate. For example, Code § 523(a)(7) exempts a government "fine, penalty, or forfeiture" from discharge in a Chapter 7 case (thereby suggesting that such a debt is a high priority debt), yet Code § 726(a)(4) -- which establishes priorities of claims in a Chapter 7 liquidation distribution -- grants such a "fine, penalty, or forfeiture" *lowest* priority, lower even than the priority given to unsecured creditors. One court has explained the disparate treatment afforded government fines, penalties, and forfeitures by §§ 523(a)(7) and 726(a)(4) as follows:

> The governmental unit which has imposed a fine on a debtor is in a far superior position than any unsecured creditor. Its debt is not dischargeable under 11 U.S.C. § 523(7) and the nonpayment of the fine can result in imprisonment. I don't believe Congress was unaware

[6](...continued)
intended that a restitution obligation not be considered a "debt" in connection with any other Code provision. That assumption is not necessarily correct. Although the Court need not decide the issue in this case, it is perfectly plausible that Congress intended a restitution obligation to be considered a debt for purposes of some but not all Code provisions.

[7] For example, DPW received no bankruptcy court distributions in this case despite being listed in the Davenports' Chapter 13 plan as an unsecured creditor.

> of the governmental unit's ability to collect a fine. Rather I think Congress viewed the fine as a form of punishment which should be paid by the debtor from exempt property or future earnings.

In re Kohr, *supra*, 82 Bankr. at 708. In other words, the court determined that Congress had decided not to permit a government that has imposed fines to share in the proceeds of a bankruptcy distribution to the same extent as other creditors, since the fines (unlike the claims of other creditors) would not be discharged in bankruptcy. In light of Congress' determination (in § 726(a)(4)) that governmental fines should receive a priority in a bankruptcy case that is lower than that of other claims -- both because the government can collect after the bankruptcy and because Congress wished such fines to be paid from future earnings -- there is nothing "anomalous" about a rule that deprives beneficiaries of restitution obligations of an opportunity to share in bankruptcy distributions.

In summary, an examination of the entire Bankruptcy Code rather than just its definitional sections demonstrates that Congress did not intend to permit the discharge of restitution obligations in Chapter 13 cases.

C. Bankruptcy Code Must Be Construed in Light of Federalism Concerns.

In construing the Bankruptcy Code, the Court is also to take into account "the interest of the States in unfettered administration of their criminal justice systems." *Kelly*, *supra*, 479 U.S. at 44. Contrary to the teaching of *Kelly*, the Third Circuit failed to take into account that interest in this case. Rather, the court arrived at what it believed to be the correct interpretation of Code § 1328 and only then did it consider what effects its decision would have on State criminal justice systems; the court concluded that "[r]egardless of the potential effects on state criminal proceedings," it had no choice but to follow what it had already determined to be Congress' intent. *In re Johnson-Allen*, *supra*, 871 F.2d at 428. This improper

method of statutory construction caused the Third Circuit to overlook the substantial federalism concerns raised by this case.

The Court explained in *Kelly* why any interpretation of the Bankruptcy Code must take into account the effects that that interpretation will have on state criminal proceedings:

> The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *Younger v. Harris*, 401 U.S. 37, 46 (1971)....[¶] In one of our cases interpreting the [Bankruptcy] Act [of 1898], Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. *See Younger v. Harris*, *supra*, 401 U.S. at 44-45. This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.

Kelly, *supra*, 479 U.S. at 47, 49. The Court also observed that "it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federa bankruptcy courts." *Id.* at 48 n.8.

The federalism concerns that guided the Court in *Kelly* are present to an even greater degree in this case. For example, the lower court decision in *Kelly* threatened bankruptcy court discharges of restitution obligations only; the lower court had recognized that criminal fines could not be discharged in a

Chapter 7 case. By way of contrast, the Third Circuit's opinion -- although applicable on its face to restitution orders only -- does not distinguish between restitution orders and criminal fines and suggests that the latter may also be discharged under Chapter 13.[8]

Moreover, if allowed to stand, the Third Circuit's decision undoubtedly will lead to invalidation of state criminal sanctions in Chapter 7 cases as well as Chapter 13 case. The Third Circuit's conclusion that restitution obligations are to be considered "debts" for all purposes under the Bankruptcy Code will have the effect of undermining *Kelly*'s efforts to prevent interference with state criminal proceedings in Chapter 7 cases. One recent decision that employed the Third Circuit's rationale in a Chapter 7 case to overturn a criminal restitution obligation was *Becker v. County of San Francisco [In re Hackney]*, 83 Bankr. 20 (Bankr. N.D. Cal. 1988). In *Becker* the convicted criminal defaulted on his restitution obligation, and the county sued on that obligation and recovered $2400. The criminal thereafter filed a Chapter 7 bankruptcy petition, and the trustee filed an adversary proceeding against the county for return of the $2400. The bankruptcy court determined that the restitution obligation was a "debt" within the meaning of the Bankruptcy Code. Accordingly, the court held that the transfer of $2400 was a "preference" under Code § 547(b) and ordered the funds to be turned over to the bankruptcy court. *Id.*

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[8] Indeed, an argument can be made that a Pennsylvania restitution obligation fits less well within Code § 101(11)'s definition of a "debt" than does a criminal fine (because a restitution obligation does not create a debtor/creditor relationship between the convicted criminal and the beneficiary of the obligation -- *see Commonwealth v. Mourar*, 349 Pa. Super. 583, 603, 504 A.2d 197, 208 (1986), *vacated and remanded for further proceedings*, 517 Pa. 83, 534 A.2d 1050 (1987)) and thus that restitution obligations might not be dischargeable under Chapter 13 even if criminal fines were found to be dischargeable. However, for purposes of the statutory analysis necessary in this case, *amici* do not believe that it is worthwhile to attempt to distinguish between restitution obligations and criminal fines. *Amici* note that the bankruptcy judge in this case stated in his opinion that the § 1328 discharge provision applies to criminal fines as well as to restitution obligations. *In re Davenport, supra*, 83 Bankr. at 316.

Finally, the Court should take note of the extent of the bankruptcy court's interference in this case with the Pennsylvania criminal justice system. The bankruptcy court attempted to play down the drastic nature of the relief it ordered by claiming that it had not issued an injunction against a probation violation hearing or even determined whether such an injunction was within its powers. *In re Davenport*, *supra*, 83 Bankr. at 316. However, the bankruptcy court's order had the same effect as a formal injunction. The court ordered that any money paid or to be paid by the Davenports to the Probation Department be turned over to the court. *Id.* at 317. That order has the effect of enjoining further collection efforts by the Probation Department, since any additional funds collected will have to be returned immediately to the court. Moreover, were the Probation Department to convene another probation violation hearing, the Davenports could eliminate any violation by paying their restitution obligation in full -- with the knowledge that those funds would have to be returned under the terms of the bankruptcy court's order. Accordingly, there can be no serious argument that the bankruptcy court has not, for all intents and purposes, enjoined further efforts by Petitioners either to collect the restitution obligation or to incarcerate the Davenports for their failure to pay.[9]

In summary, the federalism concerns that guided the Court's statutory interpretation in *Kelly* are implicated in this

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[9] The bankruptcy court that heard one of the companion cases to *Davenport* was even less subtle in its efforts to enjoin a state criminal proceeding without issuing a formal injunction. In *Commonwealth of Pennsylvania v. Johnson-Allen [In re Johnson-Allen]*, 69 Bankr. 461 (Bankr.E.D.Pa. 1987), the bankruptcy judge said that the DPW should return all post-petition restitution payments made by the Chapter 13 debtor and that state prosecutors "should" refrain from further efforts to punish the convicted criminal for nonpayment of her restitution obligation. The court said that it was not issuing an injunction because it expected the DPW and state prosecutors to obey his order without the need for an injunction, but that he would reconsider his decision not to issue an injunction if his order was not obeyed. *Id.* at 471.

case to an even greater extent than was true in *Kelly*. As shown in Section I(B) of this brief, *supra*, an examination of the *entire* Code -- rather than just its definitional section -- demonstrates that Congress did not intend to permit discharge of restitution obligations in Chapter 13 cases. But even if *amici*'s understanding of Congressional intent were merely a plausible rather than the definitive explanation of Congress' intent, *Kelly* teaches that the federalism concerns present here require a finding that Congress did not intend to permit such discharges.

D. There Is No Evidence That Congress Intended to Change the Long-Standing Judicial Rule That Criminal Sanctions Could Not Be Discharged in Bankruptcy.

Prior to enactment of the current Bankruptcy Code in 1978, a well-established judicial rule held that a bankruptcy discharge could have no effect on any portion of a criminal sentence, including a restitution order. *Kelly*, *supra*, 479 U.S. at 47. That rule applied across the board; no distinction was made between liquidation cases and cases brought under the predecessor to Chapter 13.

The Davenports contend that the Bankruptcy Reform Act of 1978 changed that long-standing judicial rule in order to allow Chapter 13 discharges of restitution obligations. However, the Davenports can point to not one piece of evidence in either the Bankruptcy Code or its legislative history to indicate that Congress intended such a major change in the bankruptcy law. *Kelly* teaches that such major changes in bankruptcy law are not to be presumed in the absence of explicit evidence of a Congressional intention to change the law.

In *Kelly*, the Court rejected an argument that Congress in the Bankruptcy Reform Act of 1978 had *sub silentio* altered the long-standing judicial rule against discharge of criminal sentences in bankruptcy in order to permit discharge of

restitution obligations in Chapter 7 cases. The Court said, "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" *Kelly*, *supra*, 479 U.S. at 51 (quoting *TVA v. Hill*, 437 U.S. 153, 209 (1978) (POWELL, J., dissenting)).[10]

Similarly, we can be certain that had Congress intended by the Bankruptcy Reform Act of 1978 to change then-existing bankruptcy law to permit discharge of restitution obligations in Chapter 13 cases, there would have been hearings, testimony, and debate concerning so drastic a change. However, there is nothing in the legislative history even suggesting that Congress intended to permit discharge of restitution obligations in Chapter 13 cases. In the absence of such evidence, the statutory construction rule set forth in *Kelly* and *Midlantic* requires a finding that the Bankruptcy Code does not permit convicted criminals to discharge their restitution obligations in Chapter 13 cases.

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[10] The Court stated its rule of statutory construction as follows:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.* If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.

Kelly, *supra*, 479 U.S. at 47 (emphasis added) (quoting *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986)).

E. There Is No Reason To Distinguish Between Chapter 7 and Chapter 13 in Determining the Dischargeability of Restitution Obligations.

This Court has already determined in *Kelly* that restitution obligations are not dischargeable in Chapter 7 bankruptcy cases. In the absence of any evidence either in the Bankruptcy Code or its legislative history that Congress intended to treat restitution obligations differently in Chapter 13 cases than in Chapter 7 cases, *Kelly* mandates a finding that the Code does not permit the discharge of restitution obligations in Chapter 13 cases.

The Third Circuit's opinion seeks a basis for such a distinction by citing legislative history to the effect that Congress wished to encourage debtors to file under Chapter 13 rather than under Chapter 7. *In re Johnson-Allen*, *supra*, 871 F.2d at 427. The Court reasoned:

> If restitution obligations were not part of the Chapter 13 plan, payments in restitution conceivably could deplete all the debtor's resources before any distribution is made to the other creditors. As a result, creditors would be more reluctant to confirm such a plan, making the Chapter 13 entirely unavailable to some debtors. Such a result is contrary to Congress' objective of expanding the availability of the Chapter 13 option. Therefore, both the language of the statute and the intent of Congress support the conclusion that the criminal restitution obligation is a debt under the Code.

Id. The court's argument proves too much. If Congress' desire to encourage more Chapter 13 filings supports a finding that restitution obligations are dischargeable in Chapter 13 cases, then that desire would justify *any* interference with state criminal proceedings in order to encourage more Chapter 13 filings. The court's argument would just as easily support a claim that a bankruptcy court could enjoin the incarceration of

a convicted criminal, on the ground that freeing the criminal would allow him to earn a living and thus to have a greater chance of successfully completing a Chapter 13 plan. Congress' desire to encourage debtors to file under Chapter 13 rather than under Chapter 7 is not evidence that Congress intended to treat restitution obligations differently in Chapter 13 cases than in Chapter 7 cases.[11]

The bankruptcy court attempted to justify treating restitution obligation differently in Chapter 7 and Chapter 13 by citing Code § 1325(b), 11 U.S.C. § 1325(b). *In re Davenport*, *supra*, 83 Bankr. at 315. Section 1325(b) requires a Chapter 13 debtor to pay in to the bankruptcy trustee all "disposable income" for a period of years in order to fund payments to creditors. The bankruptcy court reasoned that interpreting the Code as forbidding the discharge of restitution obligations would cause "conflicts" for Chapter 13 debtors subject to such obligations. *Id.* The court said that a Chapter 13 debtor could not use a portion of his "disposable income" to pay his restitution obligation without violating § 1325(b); but that if the debtor paid the restitution obligation out of the remainder of his income, by definition he would not have sufficient funds to live on. *Id.* Therefore, the bankruptcy court reasoned, Congress must have intended restitution obligations to be dischargeable in Chapter 13 cases. *Id.*

The bankruptcy court's argument is without merit. The hypothetical debtor described by the bankruptcy court simply sounds like a debtor who is not a good candidate for Chapter 13; not every debtor can qualify. Moreover, the "conflicts" in § 1325(b) do not exist if the statute is interpreted as defining

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[11] Moreover, the legislative history of the Bankruptcy Reform Act of 1978 indicates that Congress intended expanded use of Chapter 13 to benefit creditors as well as debtors: Congress determined that creditors would be better off if more debtors attempted to repay a portion of their debts out of future income rather than opting for straight liquidation under Chapter 7. *See* H.Rep. No. 95-595, 95th Cong., 1st Sess. at 118 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6079. Creditors can hardly be said to benefit from expanded use of Chapter 13 if debtors use it as a vehicle for extinguishing their criminal liabilities.

"disposable income" as the income that remains following payment of one's restitution obligation. Several courts have interpreted § 1325(b) in precisely that manner. *See Commonwealth of Pennsylvania v. Johnson-Allen [In re Johnson-Allen]*, 88 Bankr. 659 (E.D.Pa. 1988); *In re Cancel*, 82 Bankr. 674, 677 (Bankr.N.D.N.Y.), *rev'd*, 85 Bankr. 677 (N.D.N.Y. 1988).

In summary, the policy reasons advanced by the courts below for permitting discharge of restitution obligations in Chapter 13 cases fail to explain why such discharges should be permitted at the same time that discharge of restitution obligations is not permitted in Chapter 7 cases. In the absence of any evidence that Congress intended to make such a distinction between Chapter 7 and Chapter 13, *Kelly* mandates a finding that Congress did not intend to permit discharge of restitution obligations in Chapter 13 cases.

II. SUBSEQUENT CONGRESSIONAL ACTION CONFIRMS ITS UNDERSTANDING THAT RESTITUTION OBLIGATIONS ARE NOT DISCHARGEABLE

On several occasions since its adoption of the Bankruptcy Reform Act of 1978, Congress has adopted legislation that deals directly with restitution obligations. On each such occasion, Congress has expressed its belief that requiring convicted criminals to make restitution to the victims of their crimes is an extremely important goal of the federal criminal justice system. Provisions of the subsequent legislation are inconsistent with any interpretation of the Bankruptcy Code that would permit criminals to discharge their restitution obligations by filing Chapter 13 bankruptcy petitions. Accordingly, Congress' adoption of the subsequent legislation is additional confirmation that Congress never intended to permit such discharges.

A. Victim and Witness Protection Act Demonstrates Congress' Commitment to Imposing Restitution on Criminals.

Congress' adoption of the Victim and Witness Protection Act of 1982 (VWPA), P.L. 97-291, placed the federal government's unqualified endorsement on the concept that convicted criminals ought to be ordered to make restitution to the victims of their crimes. Various provisions of the VWPA render it inconceivable that Congress believed that criminals could discharge their restitution obligations by filing Chapter 13 petitions.

The VWPA requires every federal judge before passing sentence in a criminal case to consider whether, as part of his sentence, to order the convicted criminal to make restitution to the victim(s) of his crime(s). 18 U.S.C. §§ 3663-64. One of the stated purposes of the VWPA is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." *See* § 9(a) of VWPA, 18 U.S.C. § 1512 note. The legislative history of the VWPA is critical of what Congress viewed as the too infrequent imposition of restitution obligations by federal judges. It makes clear that Congress desired that use of restitution orders be increased. *See* S.Rep. No. 532, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2536.

The VWPA permits imposition of restitution obligations even when the convicted criminal is totally indigent. *United States v. Keith*, 754 F.2d 1388 (9th Cir.), *cert. denied*, 474 U.S. 829 (1985). Courts have recognized that indigency is a temporary condition that a defendant can change and thereby gain the means in the future of meeting the obligation to make restitution imposed at the time of sentencing. *United States v. Atkinson*, 788 F.2d 900 (2d Cir. 1986); *United States v. Ryan*,

874 F.2d 1052 (5th Cir. 1989).[12] Thus, while the VWPA requires a sentencing court to consider the financial condition of a defendant in making a restitution order (18 U.S.C. § 3664(a)(7)), the Act permits courts to look to the defendant's *future* earnings potential in determining his financial capabilities. *Id.*

Respondents have contended that Congress intended through the Bankruptcy Reform Act of 1978 to permit those in financial difficulty to obtain a "fresh start" and that permitting discharge of restitution obligations in Chapter 13 cases is consistent with that "fresh start" concept. However, the VWPA confirms that Congress never intended the "fresh start" concept to apply to convicted criminals or to make the bankruptcy laws a haven for criminals. Rather, Congress made clear through the VWPA that convicted criminals should be required to make reparations to their victims as part of their sentences, *now and in the future*. It was clearly not Congress' intent to provide the courts with the means to require criminal offenders to repay society for the damage caused by their crimes, only to permit the offenders to strip away that power by the simple expedient of filing a Chapter 13 petition.

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[12] The Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits all have ruled that indigency is no bar to imposition of restitution under the VWPA. In addition to *Keith*, *Atkinson*, and *Ryan*, other cases so ruling include *United States v. Sunrhodes*, 831 F.2d 1537 (10th Cir. 1987); *United States v. Purther*, 823 F.2d 965 (6th Cir. 1987); *United States v. Bruchey*, 810 F.2d 456 (4th Cir. 1987); and *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985). In summarizing these court decisions, the Fifth Circuit explained their rationale as follows:

> These circuits have allowed assessments against an insolvent defendant because the Victim and Witness Protection Act does not prohibit restitution in such instances; and a defendant's financial situation may well change in the future, making him able to pay some if not all of the restitution ordered. *Even some payments in the future, no matter how miniscule it might be in relation to the victim's loss, would be in keeping with the philosophy of the Act.*

Ryan, supra, 874 F.2d at 1053 (emphasis supplied).

B. Congress' Adoption of FIRREA Further Demonstrates Its Strong Commitment to Restitution Orders.

In response to the crisis facing federally-insured banks and savings and loan associations, and in an effort aggressively to combat bank fraud, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which became effective August 9, 1989. FIRREA further confirms Congress' strong commitment to imposition of restitution orders on criminal offenders; the restitution provisions of FIRREA, as well as the numerous provisions of the Act increasing bank fraud penalties, are inconsistent with an argument that Congress intended to permit discharge of criminal restitution obligations in Chapter 13 cases.[13]

Anti-bank fraud provisions contained in FIRREA include increases in maximum criminal penalties for bank fraud, a lengthening of the statute of limitations for bank fraud, protection and rewards for whistle blowers who disclose bank fraud, and an authorization to spend $65 million per year for the next three years to investigate and prosecute banking crimes. *See* FIRREA, Chapter IX, Subchapter F. Throughout the anti-fraud provisions of FIRREA is an emphasis on ensuring that those whose conduct led to the current banking crisis be required to disgorge any ill-gotten gains and to make restitution for the damage they caused to others -- including the American taxpayer. For example, § 963(c) of FIRREA amends § 982 of the Criminal Code, 18 U.S.C. § 982, to *require* the sentence of anyone convicted of bank fraud to include forfeiture of any of the defendant's funds derived directly or indirectly from the defendant's fraudulent conduct. Section 902(a)(1) of FIRREA authorizes the Federal Deposit

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[13] Congress' stated purposes in adopting FIRREA were "to strengthen the enforcement powers of Federal regulators of depository institutions," and "to strengthen the civil sanctions *and criminal penalties* for defrauding or otherwise damaging depository institutions and their depositors." Pub.L. No. 101-73, 103 Stat. 183, Title I, §§ 101(9) and (10) (emphasis supplied).

Insurance Corporation to order restitution for losses from any bank official whose conduct "involved a reckless disregard for the law or any applicable regulation."

Congress' commitment to requiring those responsible for the banking crisis to pay for the losses they caused is also evident in FIRREA's legislative history. Numerous members of Congress spoke out during debates on FIRREA regarding the neeed to obtain restitution from those responsible for the crisis. For example, Senator Bond of Missouri stated:

> We cannot, in good conscience, accept the burdens that this bill puts on the taxpayers without actively pusuing every crook who stole from FSLIC *with maximum recovery of ill-gotten gain*. Nor can we proceed without sending a message that there will be tough criminal penalties to be enforced in the future when and if similar fraud is perpetrated.

135 Cong. Rec. S4001 (daily ed. April 17, 1989) (remarks of Sen. Bond) (emphasis supplied).

FIRREA demonstrates Congress' clear intent that those guilty of bank fraud be required to make restitution to society as a whole for the damage they have caused. That intent cannot be squared with an interpretation of the Bankruptcy Code that would permit those found guilty of bank fraud to obtain discharge of criminal sanctions in a Chapter 13 case. Allowing such discharges would eviscerate substantial portions of FIRREA, serve to cut off enforcement efforts aimed at remedying the current financial crisis, and rob American taxpayers of an opportunity to recoup some of the $157 billion which they will be forced to pay.

III. THE THIRD CIRCUIT'S DECISION IS A SETBACK FOR ALL VICTIMS OF CRIME

Both federal and state governments have recognized the importance to our society of requiring that those convicted of

crimes be ordered to compensate their victims for losses caused by their crimes; thus, governments have made restitution a cornerstone of their criminal justice systems. Restitution requirements serve not only to compensate victims but also to punish the offender and to rehabilitate him. *Kelly*, *supra*, 479 U.S. at 52-53. Accordingly, a restitution obligation should not be considered merely another form of debt; a restitution obligation is a debt to society as a whole and a statement by society to crime victims that society cares about their plight. The federal government's strong commitment to restitution orders is evidenced by the VWPA. State governments' commitment is equally strong; restitution orders *must* be considered as a sentencing option in 30 states and is permitted in all 50 states. *See* Comment, *Criminal Restitution as a Limited Opportunity*, 13 New Eng. J. Crim. & Civ. Confinement 243, 244.

The Third Circuit's decision is a significant threat to society's continued ability to require criminals to repay society monetarily for their crimes. Permitting Chapter 13 debtors to discharge their restitution obligations is an open invitation to convicted criminals to file Chapter 13 petitions.[14] Respondents' brief attests to the significant number of instances in which Chapter 13 debtors have obtained bankruptcy court discharges of their restitution obligations, and that list includes only the

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[14] Chapter 13 contains no adequate mechanism to prevent criminals from filing Chapter 13 petitions solely to obtain a discharge of their criminal fines and restitution obligations. Although Code § 1325 requires a Chapter 13 plan to be filed in "good faith," evidence of past dishonesty or that a Chapter 13 filing was made solely for the purpose of obtaining discharge of an otherwise nondischargeable restitution obligation is not considered evidence of bad faith. *In Re Johnson-Allen*, *supra*, 69 Bankr. at 465 n.2.

Nor is it an answer to the plight facing crime victims to tell them that they are entitled to share equally with other unsecured creditors in the proceeds of the criminal's Chapter 13 bankruptcy estate. The priority of crime victims in any Chapter 13 distribution is sufficiently low that they are likely to receive little or no funds in such a distribution. *See In Re Kohr*, *supra*, 82 Bankr. at 712.

reported decisions. *See* Respondents' Opposition to Petition for Writ of Certiorari at 3-4. The Third Circuit case involved three separate instances in which convicted criminals obtained Chapter 13 discharges of their restitution obligations.[15]

The Third Circuit's decision, if allowed to stand, will have a significant negative impact on state and federal criminal justice systems. Faced with the knowledge that they have no method of ensuring that restitution obligations will not later be overturned, criminal justice systems will be forced to turn increasingly to other forms of sentencing to ensure that society's retributive, deterrent, and rehabilitative goals are met to the extent possible. The most likely result will be a lengthening of prison sentences, the one form of sentence that to date no bankruptcy court has attempted to second-guess. But longer prisons sentences may well not be in the best interest of convicted criminals and would exacerabate problems caused by already overcrowded prisons. The flexibility of sentencing judges in choosing the combination of incarceration, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems would be significantly restricted. *See Kelly, supra*, 479 U.S. at 49.

Most significantly, a trend toward longer prison terms in lieu of restitution orders would cause grave harm to the victims of crime. That trend not only would leave victims' losses uncompensated but also would be a signal to victims that society does not care about the harm they have endured. Each of the *amici* has battled long and hard to promote the rights of crime victims and has been heartened by the public's increasing acceptance of victims' rights. Affirmance of the

[15] Not suprisingly, the number of reported cases involving Chapter 13 debtors seeking discharge of restitution obligations has increased dramatically since this Court's decision in *Kelly*. Prior to *Kelly*, most attempts to obtain discharge of restitution obligations involved Chapter 7 debtors.

Third Circuit's decision would be a significant backward step in that struggle.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the Third Circuit's decision and direct the bankruptcy court to enter an order stating that the Davenports' obligation to make restitution for their crimes has not been discharged by their Chapter 13 filing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been filed with the Clerk. Respondents have refused consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case is of grave concern to *amici*. The Court of Appeals for the Third Circuit ruled that a discharge under Chapter 13 of the Bankruptcy Code nullifies a state court's crim-

inal sentence requiring restitution as a condition to probation. The decision rejects this Court's persuasive dicta in *Kelly v. Robinson*, 479 U.S. 36 (1986), that criminal sanctions are not dischargeable "debts" within the meaning of the Bankruptcy Code, and violates the Court's longstanding policy, based on principles of federalism and comity, against federal court interference with state criminal prosecutions.

As a practical matter, this ruling, unless reversed by this Court, will allow thousands of convicted criminals to avoid fulfilling any sentence simply by obtaining a discharge of "debts" under Chapter 13 of the Bankruptcy Code. As a result, it will discourage state judges from utilizing fines, restitution orders, and other monetary sanctions in criminal sentencing, despite the fact that many studies have shown that these sanctions most effectively serve the purposes of deterrence, retribution, and rehabilitation for many crimes. With restitution a less attractive option, the state courts would have to rely more heavily on incarceration in fashioning criminal sentences, thus placing added burdens on the States' already overtaxed prison systems.

Amici submit that the ruling below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* seek leave to file this brief to assist the Court in its resolution of the case.

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QUESTION PRESENTED

Whether a criminal restitution order imposed as a condition of probation is a dischargeable "debt" in a case under Chapter 13 of the Bankruptcy Code.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-156

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, *et al.*,
Petitioners,

v.

EDWARD J. and DEBORA A. DAVENPORT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

Pennsylvania's criminal restitution statute authorizes a sentencing judge to order restitution as a condition of probation or parole in any case where the offender has

obtained property unlawfully or caused personal injury to the victim of the crime. 18 Pa. Cons. Stat. § 1106(a), (b). As the Pennsylvania courts have explained, criminal restitution furthers the "rehabilitative goal" of punishment by "impressing upon the offender the loss he has caused and his responsibility to repair that loss as far as it is possible to do so." [1] For this reason and because restitution affords courts an attractive alternative to incarceration, Pennsylvania judges imposed restitution penalties in more than 5,000 cases in 1987 alone.

Respondents, Edward and Debora Davenport, each pleaded guilty on September 17, 1986, to one felony count and two misdemeanor charges of welfare fraud, based on their fraudulent receipt of $4,144.80 in public assistance benefits and food stamps over a seven-month period in 1984 and 1985. J. A. 56-70. Respondents each were sentenced by the Bucks County, Pennsylvania, Court of Common Pleas to one year probation and ordered, as a condition to probation, to make criminal restitution of the amount fraudulently obtained from the government. Each was ordered to pay $2,072.40, in ten monthly installments of $208 beginning in December 1986.

Respondents never made any of the required restitution payments, nor did they invoke statutory procedures to seek modification of the restitution order on grounds of inability to pay. See 18 Pa. Cons. Stat. § 1106(c)(3). Instead, on May 25, 1987, they filed a voluntary petition under Chapter 13 of the Bankruptcy Code, and in the petition listed the criminal restitution obligation as an "unsecured debt."

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[1] *Commonwealth v. Wood*, 300 Pa. Super. 463, 467, 446 A.2d 948, 950 (1982), citing *Commonwealth v. Kerr*, 298 Pa. Super. 257, 260, 444 A.2d 758, 760 (1982), quoting *Commonwealth v. Erb*, 286 Pa. Super. 65, 79, 428 A.2d 574, 581 (1981), and *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 508, 407 A.2d 24, 26 (1979).

Based on respondents' failure to pay restitution, the Probation Department commenced proceedings to determine whether respondents had violated parole. Under Pennsylvania procedures, the offender is entitled to a *Gagnon II* [2] hearing at which the court must consider whether, given the financial circumstances of the defendant, nonpayment constitutes violation of probation. When the Probation Department refused to withdraw the charges despite the pendency of the bankruptcy proceeding, respondents commenced an adversary proceeding in bankruptcy court seeking a declaration that the restitution order was a dischargeable debt and to enjoin the Probation Department from taking any "further action" to "collect the restitution debt." J.A. 31.

The bankruptcy court entered judgment for respondents, holding that the restitution obligation was a dischargeable debt under Chapter 13 of the Bankruptcy Code. Pet. App. 68a-102a. Respondents subsequently submitted a repayment plan under Chapter 13 that provided for total payments to all creditors and the trustee of only $120 over a twelve-month period. After that plan was confirmed and payments were completed, the bankruptcy court granted the respondents a discharge under 11 U.S.C. § 1328(a).

The Commonwealth, petitioners in this Court, appealed the ruling on dischargeability of the restitution order, and the district court reversed, holding that Congress did not intend to permit the discharge of criminal restitution orders under Chapter 13 and that a discharge would violate principles of federalism. Pet. App. 59a-66a. A panel of the Third Circuit, by a two-to-one vote, reversed the

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[2] In *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973), the Court held that due process mandates preliminary and final revocation of probation hearings, known as *Gagnon I* and *Gagnon II* hearings. Under *Bearden v. Georgia*, 461 U.S. 660 (1983), an offender may not be penalized for failing to comply with a restitution order that he or she does not have the ability to pay.

district court and reinstated the bankruptcy court's ruling. Pet. App. 1a-58a. The majority "[found] the reasoning of the Court of Appeals in *In re Robinson*, [776 F.2d 30 (2d Cir. 1985), *rev'd sub nom. Kelly v. Robinson*, 479 U.S. 36 (1986),] persuasive and conclude[d] that the restitution obligation constitutes a debt so long as any person or entity has a right to enforce that obligation" (Pet. App. 25a), even though the Second Circuit's reasoning relied on by the court below was rejected by this Court in *Kelly*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Kelly v. Robinson*, the Court held that a criminal restitution order imposed as a condition of probation is not a dischargeable debt under Chapter 7 of the Bankruptcy Code. The Court construed the statutory language "in light of the history of bankruptcy court deference to criminal judgments," "in light of the interests of the States in unfettered administration of their criminal justice systems," and "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders." 479 U.S. at 43-46. Because the Court found an applicable exception to Chapter 7 discharge in Section 523(a)(7) of the Code, it did not specifically decide whether a restitution order is a "debt" within the meaning of Section 101(4) of the Code. Nonetheless, the Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts,'" and stated that, notwithstanding the "broadly drafted" definition of "debt," "nothing in the legislative history . . . compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." 479 U.S. at 50 & n.12.

The same principles of federalism and statutory interpretation on which the Court relied in *Kelly* also require the conclusion that a criminal restitution order is not a dischargeable debt under Chapter 13.

1. A bankruptcy court's discharge of a restitution order imposed as a condition of probation violates the fundamental policy against federal interference with a State's sovereign power to punish criminals. First, the discharge nullifies a portion of a lawfully entered criminal sentence and effectively disables the State from imposing any alternative sentence. Second, the discharge constitutes an impermissible intrusion upon the state court fact-finding process. The discharge not only nullifies any previous judicial findings that the offender is able to make restitution, but also preempts available state processes that permit the sentencing court to reduce or eliminate the restitution obligation where a change in the offender's financial circumstances renders compliance unduly burdensome.

To permit Chapter 13 discharges of criminal monetary sanctions would have a devastating effect on the sentencing process generally. Sentencing courts would feel constrained to temper their own and their legislators' judgment that rehabilitation is the most effective form of punishment with the knowledge that the convicted criminal might avoid fulfilling the sentence by obtaining a Chapter 13 discharge. Inevitably, courts will be faced with the Hobson's choice of absolving offenders of punishment or imposing prison terms that may do the offender more harm than good and will cost the States thousands of dollars per prisoner per year.

2. Congress did not intend to permit the discharge of criminal sentences under the Bankruptcy Code. The new Code was enacted, as the Court in *Kelly* explained, "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders." 479 U.S. at 46. There is no evidence in either the statutory language or the legislative history that Congress intended to change that settled rule. Indeed, the history most closely on point is the House Report's explicit statement that the "bankruptcy laws are

not a haven for criminal offenders, but are designed to give relief from financial over-extension." H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6299.

The court below erroneously relied on the expanded definition of "claim" in the new statute, failing to recognize that the language was intended to allow resolution of contingent, unmatured, unliquidated, and similar obligations not previously "provable" under the Bankruptcy Act, not to nullify criminal orders. The discharge of a criminal restitution order would defeat the purpose of the order to impress upon the criminal offender his responsibility to repair the loss that he or she has caused, an effect that is not mitigated by permitting the State to share in any distribution of the estate. It also would be inconsistent with Congress's purpose to enable more debtors to use the Chapter to fulfill their moral obligation to repay their debts.

ARGUMENT

I. A FEDERAL BANKRUPTCY COURT'S DISCHARGE OF A STATE COURT'S CRIMINAL RESTITUTION ORDER CONSTITUTES AN IMPERMISSIBLE INTRUSION UPON THE STATE CRIMINAL SENTENCING PROCESS.

The Court in *Kelly* reaffirmed its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." 479 U.S. at 47. That conviction reflects " 'the fundamental policy against federal interference with state criminal prosecutions' " (*id.*, quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)), that lies at the heart of the principles known as "Our Federalism." As the Court explained in *Younger* (401 U.S. at 44), the policy of deference to state criminal proceedings is based on

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Respect for state processes takes on special importance when a federal court is asked to review a state criminal sanction because "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Kelly*, 479 U.S. at 47. Thus, while state criminal proceedings are subject to limited collateral review through the writ of habeas corpus, even in that context the Court has emphasized that the "States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

Because a Chapter 13 discharge of a criminal restitution order nullifies a portion of the state court judgment, the analogy to federal habeas proceedings is instructive. Even though the writ of habeas corpus protects against a state court's infringement of a defendant's constitutional rights, it guarantees only the fundamental fairness of the criminal process as applied to the defendant, not the correctness of the particular result. Federal procedures for habeas corpus relief, 28 U.S.C. § 2254, require deference to proper state process. Section 2254(b) provides that the writ shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Under Section 2254(d), "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct."

A bankruptcy court's discharge of a restitution order entered as a condition of probation constitutes an im-

permissible federal intrusion on a State's sovereign power to punish criminals. First, the discharge vacates a portion of a criminal sentence that has been entered in full accord with all substantive and procedural mandates of the Constitution. The invasion of state rights cannot be justified on the ground that a discharge would relieve the debtor of burdensome obligations or give him a "fresh start"; to the contrary, the "burden" on the offender is a necessary component of the effectiveness of the restitution order as a deterrent and rehabilitative measure, and is less severe than alternative forms of punishment. Clearly, a bankruptcy court could not purport to "discharge" a sentence of incarceration if selected in the first instance by the state court. "The result should not be different merely because the state chose a less restrictive means to further its penal goals." *In re Vik*, 45 Bankr. 64, 68 (Bankr. N.D. Iowa 1984).[3]

The intrusion is particularly severe because, unlike the situation where a conviction is disturbed on habeas review and the State can retry or resentence the defendant, the State may be disabled from fashioning an alternative sentence once the restitution penalty has been discharged. This disability results from the automatic stay in bankruptcy and from 11 U.S.C. § 524(a)(2), which provides that a discharge in bankruptcy operates as an injunction against an action to collect any debt discharged under Section 727, 944, 1141, 1228, or 1328 of the Code. Alluding to the automatic stay, the bankruptcy judge in this case made clear that the State would be acting at its peril

[3] The distinction that restitution imposes a direct monetary obligation on the offender is unpersuasive. Incarceration, for example, imposes even more severe, albeit indirect, financial sanctions because it precludes the offender from being gainfully employed. Significantly, incarceration also imposes substantial costs and burdens on the State. Similarly, a sentence ordering community service as a condition of probation may cause significant financial burdens by limiting the time the offender has available for gainful employment.

if it proceeded with a revocation of probation hearing based on respondents' noncompliance with the restitution order. See, *e.g.*, Tr. of Oct. 26, 1987, at 39-40 (reprinted in petitioners' appendix in the Third Circuit at 56a-57a). Indeed, in *Kelly*, the respondent had sought and obtained from the court of appeals a remand for entry of an injunction that effectively would have barred the State from seeking to revoke the respondent's probation and from requesting alternative punishment, including incarceration. See also *In re Brown*, 39 Bankr. 820, 829-30 (Bankr. M.D. Tenn. 1984) (enjoining prosecutor from seeking revocation of probation for nonpayment of restitution following discharge in bankruptcy).

Second, a discharge impermissibly intrudes on the state court's fact-finding processes by nullifying findings regarding the offender's ability to pay restitution and preempting state processes to consider alleged changes in the offender's financial condition. As required by *Bearden v. Georgia*, 461 U.S. 660 (1983), Pennsylvania has incorporated a panoply of procedures into the sentencing and revocation of probation process to ensure that the restitution order does not exceed the offender's ability to pay. Pennsylvania's general restitution statute, 18 Pa. Cons. Stat. § 1106, requires that before the sentencing court may order restitution it must consider "on the record" several factors, including "that the amount awarded does not exceed the defendant's ability to pay." *Commonwealth v. Wood*, 300 Pa. Super. at 467, 446 A.2d at 949-50. See also 42 Pa. Cons. Stat. § 9754(c) (court may order restitution only "in an amount [the defendant] can afford to pay"). If as a result of changed circumstances during the probation period the offender becomes financially unable to comply with the restitution order, he may move the sentencing court to alter or amend the order. See 18 Pa. Cons. Stat. § 1106(c)(3). The sentencing court, moreover, cannot find a violation of probation if nonpayment is caused by the offender's financial circumstances. See page 3 and note 2 *supra*.

The federal discharge of a restitution order not only nullifies the original findings of the sentencing judge, it also preempts state procedures for modifying restitution orders and for determining whether probation has been violated. The result is an intrusion into the state process far more extensive than that authorized even in habeas proceedings. The bankruptcy debtor, unlike the habeas petitioner, is excused from exhausting available state remedies, and he need not overcome the presumption of correctness generally afforded state court findings of fact.

Third, the intrusive effect that Chapter 13 discharges would have in particular cases is greatly exacerbated by the effect that such discharges would have on sentencing judges generally. Every State and the District of Columbia presently authorize use of restitution orders, and in many jurisdictions such orders are mandatory.[4] As the Court has noted, restitution is an important deterrent and rehabilitative penalty:

> Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a

[4] The court of appeals ruling also would undermine federal policy by allowing the discharge of federal criminal restitution orders. See, *e.g.*, Washington Post, Nov. 25, 1986, A-1 (Ivan F. Boesky to pay $50 million in restitution for illegal insider information); Washington Post, Sept. 18, 1989, A-1 ("More than 37,000 people convicted of federal crimes and sentenced to pay fines or restitution . . . owe the government more than $646 million, according to Justice Department figures.").

Congress, in the federal Victim and Witness Protection Act, enacted in 1982, emphasized the importance of restitution as a sentencing tool. The statute not only authorizes restitution but requires sentencing judges to state reasons on the record if no restitution or only partial restitution is ordered. 18 U.S.C. § 3579 (a)(2). Ironically, the statute was intended to provide a model for action by state and local officials (see 128 Cong. Rec. S23399 (1982) (statement of Sen. Hawkins)), and in fact has influenced a number of subsequent state enactments.

> penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and punishment gives restitution a more precise deterrent effect than a traditional fine.

Kelly v. Robinson, 479 U.S. at 49 n.10, citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 937-41 (1984). It also is an effective retributive penalty because the punishment is precisely proportional to the crime.

To permit the discharge of restitution orders would undermine state policies favoring restitution and "hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Kelly v. Robinson*, 479 U.S. at 49. Moreover, in order to ensure that their laws do not lose all deterrent force, the States may be forced to incarcerate more criminals instead of relying on probation. The increased reliance on incarceration poses particular concern given the current crisis in prison overcrowding. See U.S. Department of Justice, *Bureau of Justice Statistics Annual Report Fiscal 1985* 35 (April 1986). It is increasingly difficult to find prison space for dangerous criminals, increasingly difficult to have any hope that incarceration can rehabilitate a criminal, and increasingly difficult even to protect the safety of inmates and prison employees, as recent events in petitioners' own system demonstrate.[5] These circumstances make it all the more critical that federal deference to state sentencing processes be enforced.

[5] N.Y. Times, Oct. 28, 1989, § 1 at 9, col. 1 ("Rioters Destroy Nearly Half the Buildings in a Pennsylvania Prison"); N.Y. Times, Oct. 31, 1989, § D at 23, col. 1 ("Many Are Leaving Prison Hit By Riots").

II. A CRIMINAL RESTITUTION ORDER DOES NOT CREATE A "DEBT" DISCHARGEABLE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE.

Section 1328(a) of the Bankrupcty Code provides that upon completion of a repayment plan under Chapter 13, the court will discharge the debtor's "debts." Section 101 (11) defines a "debt" as a "liability on a claim." Section 101(4)(A), in turn, defines a "claim" as a "*right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" (emphasis added). The issue here is whether a criminal restitution order imposed as a condition of probation gives rise to a "right of payment" within the meaning of the Bankruptcy Code. While a court must look first to the statutory language, it "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly*, 479 U.S. at 43 (quotation marks and citations omitted).

The strong policy of deference to state criminal judgments discussed in Point I above, the consistent authority treating criminal sanctions as nondischargeable under the Bankruptcy Act, the absence of any legislative history showing that the Code was intended to change that result, and the statutory language all compel the conclusion that a restitution order is not a dischargeable debt under Sections 101 and 1328 of the Code.

1. The starting point must be this Court's analysis in *Kelly*. There, the Court made clear that the statutory language must be construed "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice system." 479 U.S. at 44.

That deference, the Court explained, was reflected in judicial interpretations of the discharge provisions in

Bankruptcy Act. Although a literal reading of the Act might have suggested that criminal penalties were dischargeable, the courts refused to reach that result. Instead, "[t]he rule preventing discharge of criminal fines was articulated promptly after the Bankruptcy Act of 1898 was passed, see *In re Moore*, 111 F. 145, 148-49 (W.D. Ky. 1901), and was uniformly accepted at the time Congress was considering the Code." *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026, 1032 n.8 (1989), citing *Kelly*, 479 U.S. at 45-46. Thus, by the time that Congress amended the bankruptcy laws in 1978, there was "an established judicial exception to discharge of criminal sentences, including restitution orders." *Kelly*, 479 U.S. at 46.

2. " 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' " *Kelly*, 479 U.S. at 47, quoting *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). See also *Ron Pair Enterprises*, 109 S. Ct. at 1032-33; *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365 (1988). If Congress had intended to allow bankruptcy courts to discharge restitution orders, " 'we can be certain there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.' " *Kelly*, 479 U.S. at 51, quoting *TVA v. Hill*, 437 U.S. 153, 209 (1978) (Powell, J., dissenting).

The Court in *Kelly* indicated in dictum that "nothing in the legislative history of these sections [Section 101 (4) and the Code's priority and dischargeability sections] compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." 479 U.S. at 50 n.12. That dictum remains persuasive and should be followed. There is no pronouncement in the

committee reports or (to our knowledge) even from an individual legislator specifying an intent to change the settled rule. The House Report, the most frequently cited source of Congress's intent in enacting the Code, stated to the contrary: "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension." H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6299. While the statement was made in the course of explaining the exception to automatic stay for criminal proceedings, it aptly expresses Congress's intent that the Code, like the former Act, be a means of adjusting "civil liabilities." *In re Moore*, 111 F. at 150.

The court of appeals misconstrued two aspects of the legislative history when it inferred that Congress intended to change existing law. First, the court cited Congress's intent to expand what constitutes a "claim." The broader definition was not enacted, however, in order to encompass criminal sanctions. Congress sought, rather, to redress problems created by the restrictive definition of "allowable" and "provable" claims under the Act that made it impossible for some debtors to resolve all their civil debts in bankruptcy. Congress was particularly concerned about contingent and unliquidated claims that were "non-provable" under the Act:

> [U]nder the liquidation chapters of the Bankruptcy Act, certain creditors are not permitted to share in the estate because of the non-provable nature of their claims. Thus, relief for the debtor is incomplete, and those creditors are not given an opportunity to collect in the case on their claims. The proposed law will permit complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start.

H.R. Rep. No. 595, *supra*, at 180, reprinted in 1978 U.S. Code Cong. & Admin. News at 6141. See also *id.* at 309, reprinted in U.S. Code Cong. & Admin. News at 6266 (the broader definition of "claim" in the Code "contemplates that all legal obligations of the debtor, *no matter how remote or contingent*, will be able to be dealt with in the bankruptcy case") (emphasis added). The statutory language is consistent with this approach. The Code's definition of "claim" includes any right to payment that is "unliquidated," "contingent," "unmatured," or "disputed" (11 U.S.C. § 101(4)(A)), but does not include any modifier that in any way suggests the incorporation of criminal sanctions.

Second, the court of appeals believed that including a criminal restitution order as a debt would fulfill Congress's purpose to encourage debtors to file under Chapter 13 rather than to liquidate under Chapter 7. It is true that Congress intended Chapter 13 to provide consumer debtors a more "realistic alternative to straight bankruptcy liquidation" than former Chapter XIII of the Act. H.R. Rep. No. 595, *supra*, at 117, reprinted in 1978 U.S. Code Cong. & Admin. News at 6078. But providing that alternative says nothing about what is a debt, as Judge Hutchinson pointed out in dissent from the decision below:

> Only debts are subject to discharge. The fact that chapter 13 contains a very broad discharge for obligations which are debts does not necessarily mean that criminal restitution orders should be considered debts. The question is not whether Congress intended to broaden the availability of the Chapter 13 remedy, but how great it intended this expansion to be. . . . [T]he Supreme Court teaches us that if Congress had intended to remove the power to finally define the extent to which a person convicted of crime should make restitution from the criminal courts and place it in the bankruptcy courts—by relegating his criminal restitution orders to the same status as his other obligations—it would have spoken more clearly.

Pet. App. 58a n.5.[8]

[8] Judge Hutchinson's comment is particularly apt in view of the issue posed by the bankruptcy judge in this case:

There is no evidence in the legislative history of Chapter 13 that Congress intended to make criminal penalties dischargeable. Indeed, such an intent would be inconsistent with Congress's objective to make Chapter 13 more widely available to consumer debtors, in part because "it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations." H.R. Rep. No. 595, *supra*, at 118, reprinted in 1978 U.S. Code Cong. & Admin. News at 6079. It would make little sense on the one hand to encourage debtors more fully to meet their civil obligations and on the other to excuse them from fulfilling their "debt to society" engendered by criminal misconduct. Moreover, even without the discharge of a criminal restitution order, the Chapter 13 debtor is no worse off than under Chapter 7 (under which *Kelly* holds such orders are not dischargeable), and still enjoys the procedural and substantive advantages (*e.g.*, avoiding loss of all nonexempt property) of Chapter 13.

3. This Court repeatedly has cautioned against adopting an overly literal interpretation of the Bankruptcy Code that would conflict with state or federal policies, with other portions of the statute, or with the legislative history of the Code. *Ron Pair Enterprises*, 109 S. Ct. at 1031-32; *Kelly*, 479 U.S. at 49; *Midlantic National Bank*, 474 U.S. at 502. These cautions warrant particular attention here because the court of appeals' interpretation would defeat state and federal policies and is not the only reading permitted by the language of the Code.[7]

"Maybe . . . the focus of the inquiry, is to who decides where the disposable income goes."

"Is it the State Court or is it Bankruptcy Court?"

Tr. at 75, Third Circuit App. 92a. In that judge's view, and in the view of the court below, the bankruptcy court, not the State, makes that determination.

[7] Significantly, the court below, while purporting to rely on the "plain meaning" of the statute, in fact interpreted the language

The phrase "right to payment" implies a civil obligation that creates a debtor-creditor relationship, that is, an obligation that ultimately may be reduced to judgment. This implication is reinforced by the explanatory language that follows the phrase in Section 101(4)(A), which does not accurately characterize a restitution order imposed as a condition to probation or parole. This reading of the statute—to exclude criminal sanctions—is consistent with the extant state of the law at the time that the Code was enacted. The few state courts to consider the issue all had ruled that a discharge in bankruptcy did not affect a criminal restitution obligation because the sentence did not create a debtor-creditor relationship between the offender and the State. See *Kelly*, 479 U.S. at 46 & n. 7, citing, *e.g.*, *State v. Mosesson*, 78 Misc. 2d 217, 218, 356 N.Y.S.2d 483, 484 (1974). See also *Commonwealth v. Mourar*, 349 Pa. Super. 583, 603, 504 A.2d 197, 208 (1986) (criminal restitution order does not create a debtor-creditor relationship under Pennsylvania law), vacated, 517 Pa. 83, 534 A.2d 1050 (1987). The court of appeals' reading, moreover, creates a fundamental inconsistency between Section 362(b)(1) of the Code, which exempts from the automatic stay criminal proceedings against the debtor, and Section 1328, which would permit discharge of any monetary sanction resulting from such proceedings.[8]

The court of appeals' interpretation must fail because it does not acknowledge the fundamental distinction be-

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in view of the legislative history emphasizing the broad definition of the term "claim." See Pet. App. 19a-23a. As discussed at pages 14-15 above, the court misread the relevant legislative history.

[8] The court below echoed Justice Marshall's point in dissent in *Kelly* that, if criminal penalties are not debts, the language of Section 523(a)(7) of the Code would be unnecessary. To interpret "debts" to include criminal penalties, however, would create other inconsistencies, such as that between Section 362(a)(1) and Section 1328.

tween a criminal sanction and a civil debt. A bankruptcy proceeding is intended to permit a financially overextended debtor to adjust his private relationships with his creditors. The creditor's right—both inside and outside of bankruptcy—is to compensation, whether its claim is satisfied voluntarily (by the debtor's payment) or involuntarily (by foreclosure on security, execution on a judgment, etc.).

A criminal punishment, by contrast, reflects a public obligation, an obligation to society, and focuses solely on the offender. "The 'fresh start' envisioned by the imposition of probation conditions is entirely different from the one resulting from discharge in bankruptcy. Fundamental to the imposition of probation is the belief that its conditions will result in the rehabilitation of the probationer at no cost to the public safety." *United States v. Alexander*, 743 F.2d 472, 480 (7th Cir. 1984). Thus, while a fine or restitution order may result in compensation for injury caused by a crime, any compensatory benefits are ancillary to the deterrent, retributive, and rehabilitative effect of the sentence. See *Kelly*, 479 U.S. at 53. Viewed in this context, the court of appeals' concern that the State must be able to participate in distribution of a debtor's estate under Chapter 13 (see Pet. App. at 23a-24a), is irrevelant. Because the debtor does not care which of his creditors receive distributions from the Chapter 13 trustee or in what amount, so long as he receives a discharge, the trustee's payments to the State do not serve the punitive purpose of the restitution order.

Pennsylvania's criminal statute incorporates this distinction. The State recognizes that the "burden" resulting from compliance with a restitution order furthers the rehabilitative purpose:

> [W]here sacrifice is necessary, the probationer or parolee may learn to consider more carefully the consequences of his or her acts and thereby strengthen

> the offender's sense of responsibility. Thus, an order of restitution may properly require additional or alternative employment, a reduction of expenses, and even a temporary change in lifestyle in order to achieve that sense of responsibility which signals effective rehabilitation.

Commonwealth v. Wood, 300 Pa. Super. at 468, 446 A.2d at 950. The State has no "right to payment" if the offender fails to comply with the condition. The State may proceed either by contempt or by motion for revocation of probation or parole. See, *e.g.*, 18 Pa. Cons. Stat. § 1106 (f). But it has no power to seek a civil judgment and cannot seize property or garnish wages, and the restitution order may be modified or deleted if the offender becomes unable to pay. Moreover, a criminal restitution order does not affect any private rights that the victim of the crime may have against the offender, except that the amount of any civil award is reduced by any amount actually paid to the State and forwarded to the victim under the criminal judgment. *Id.* § 1106(g).[9]

The statutory language is, at best, open to competing interpretations. Under these circumstances, the Code should not be construed to overrule the settled doctrine, based on principles of comity, that a bankruptcy court discharge does not nullify any portion of a state criminal sentence.

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[9] The sentence in this case illustrates the distinction between civil and criminal obligations. In civil cases, respondents would be jointly and severally liable for the full amount that was criminally obtained. The sentencing court, however, ordered each respondent individually to pay 50% of the full amount. Obviously, one respondent would not be subject to revocation of probation based on the other respondent's nonpayment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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In The

Supreme Court of the United States

October Term, 1989

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL.,

Petitioners,

v.

EDWARD J. DAVENPORT, ET UX.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, VIRGIN ISLANDS, AND WYOMING* AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are States, each of which administers a criminal justice system within its borders, and each of which views the decision of the Third Circuit Court of Appeals in this case as a serious threat to the criminal justice system of the states and of the entire country. It is the belief of amici curiae that the case not only is wrongly decided as to criminal restitution orders, but it will be interpreted as a holding that criminal fines and other monetary criminal penalties, in addition to restitution orders, are dischargeable as "debts" in a Chapter 13

bankruptcy. If that is the case, the federal bankruptcy courts will be in a position to interfere with state court imposed criminal sanctions to an even greater degree than was considered inappropriate in *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986). If criminal restitution orders, criminal fines and other monetary criminal sanctions are all dischargeable in a Chapter 13 bankruptcy, incarceration will become the only effective measure available to criminal courts to punish and rehabilitate convicted offenders.

The decision of the Third Circuit Court of Appeals fails to recognize the important function that such monetary criminal sanctions serve in carrying out penal goals of deterrence, prevention, rehabilitation and proportional justice. If its decision is upheld, amici curiae will be deprived of the flexibility to use the best available penal sanctions to fit the crime and will be forced to use incarceration when that sanction would otherwise be unnecessary. Moreover, the Third Circuit's decision flies in the face of this Court's longstanding policy, based on principles of federalism and comity, against federal court interference with state criminal prosecutions. It also ignores the established principle that federal bankruptcy laws are designed to relieve honest debtors of their civil obligations, not to impede the authority of the States, or any other governmental entity, to enforce the criminal laws.

In essence, amici curiae believe, as Judge Shapiro stated in the District Court decision which was reversed in this case, that:

> It is essential that state courts are able to impose penal sanctions other than incarceration without fear that a federal court will render this punishment nugatory after the fact.

Davenport v. Com. of Pa., Dept. of Public Welfare, 89 B.R. 428, 430 (E.D. Pa. 1988). Because State courts will be denied this ability under the reasoning of the decision below, amici curiae support the Commonwealth of Pennsylvania is urging this Court to reverse that decision.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a case of statutory construction. The Third Circuit's interpretation of the term "debt" in this case is based on the text of the Bankruptcy Code and has a superficial logic, but it ignores a myriad of reasons why such a literal construction should not be applied, reasons which were laid out quite clearly by this Court in *Kelly v. Robinson*, 479 U.S. 36 (1986).

In fact, the Third Circuit's decision turns this Court's decision in *Kelly* on its head. In effect, the Third Circuit has held that *Kelly* stands for the proposition that criminal penalties are "debts" for purposes of the Bankruptcy Code. Based on that interpretation of *Kelly*, the court incorporates expansive language indicating that all criminal sanctions, not just restitution orders, are dischargeable debts in a Chapter 13 bankruptcy. Only the dissent by Judge Hutchinson below points out that this Court, in *Kelly*, indicated that "policy considerations and history transcend the logic of textual analysis" in deciding whether criminal penalties should be considered "debts" under the Bankruptcy Code. *In re Johnson-Allen*, 871 F.2d 421, 431 (3rd Cir. 1989) (Hutchinson, J., dissenting).

Judge Hutchinson's view of *Kelly* is accurate. In *Kelly*, this Court began its analysis by stating that the text is only the starting point in construing a statute:

> In this case, we must consider the language of §§ 101 and 523 in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems.

479 U.S. at 43-44. The Court then outlined the policy reasons why the term "debt" should not be construed to include criminal penalties, concluding with the statement that "we have serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." 479 U.S. at 50.

The formidable policy considerations expressed by the majority in *Kelly* apply with equal force to this case. They may, in fact, be even more important in this case, because the efficacy of all monetary criminal sanctions, not just restitution orders, may hang in the balance. The potential for the bankruptcy courts to interfere with state criminal court judgments if this case is affirmed is even greater than this Court envisioned when the *Kelly* opinion was written.

ARGUMENT

I. THE TEXTUAL CONSTRUCTION OF THE TERM "DEBT" BY THE COURT BELOW IGNORES THE TEACHING OF *KELLY v. ROBINSON* AND TURNS *KELLY* ON ITS HEAD.

This Court considered whether criminal penalties were "debts" for purposes of the Bankruptcy Code in

Kelly v. Robinson, 479 U.S. 36 (1986). There the Court began its analysis by stating that:

> [T]he "starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring). But the text is only the starting point. As Justice O'Connor explained last Term, " ' "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." ' " *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (in turn quoting *United States v. Heirs of Boisdore*, 8 How 113, 122 (1849). In this case, we must consider the language of §§ 101 and 523 in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems.

479 U.S. at 43-44.

The Court then described the historical development of the judicially created exception to discharge for criminal penalties under the Bankruptcy Act, the policy considerations which led to the creation of that exception, and the lack of anything in the legislative history to indicate that Congress intended to eliminate that judicially created concept when it enacted the Bankruptcy Code in 1978. 479 U.S. at 43-50.[1] All of that discussion

[1] The Court quotes from *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986) with regard to statutory construction in this context:

(Continued on following page)

was by way of construing the term "debt" such that it would not conflict with the judicially created exception to discharge for criminal penalties, a construction which this Court stopped just short of adopting as its holding, stating instead that:

> In light of the established state of the law – that bankruptcy courts could not discharge criminal judgments – we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of § 101(4). But we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

479 U.S. at 50.

The Third Circuit's decision in this case ignores the teaching of *Kelly* that the term "debt" must be interpreted in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal

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(Continued from previous page)

> "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.' "

479 U.S. at 47 (citations omitted).

justice systems. In fact, it turns the *Kelly* decision on its head by focusing instead on the view of the dissent in *Kelly* that the majority's holding that § 523(a)(7) preserves restitution orders from discharge in a Chapter 7 bankruptcy, "compels the conclusion that restitution is a debt." 871 F.2d at 426.

In discussing Justice Marshall's dissent in *Kelly*, the Third Circuit states:

> Noting that only debts are subject to discharge under the Code, Justice Marshall reasoned that *if restitution orders and other criminal penalties were not debts*, there would be no need to except them from discharge under Chapter 7. *Kelly*, 479 U.S. at 58. We find this reasoning persuasive and conclude that Congress must have recognized that such obligations were debts within the meaning of the Code. *See Kelly*, 479 U.S. at 58 (dissent); *In re Heincy*, 78 B.R. at 248; *In re Cullens*, 77 B.R. at 828.

The Court's analysis in *Kelly* also provides as apt response to the argument that criminal restitution is not a debt when such restitution is ordered primarily to rehabilitate the offender rather than to compensate the victim. As the Court held, section 523(a)(7) excepts from discharge criminal restitution precisely because that penalty is imposed primarily for punitive and rehabilitative purposes, and only incidentally for purposes of compensating the victim. The statutory exception to discharge logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such penalties are debts despite the underlying motivations of punishment and rehabilitation. Therefore, we hold that restitution obligations constitute debts even when the state's primary objectives in imposing such

obligations are to rehabilitate and to punish the offender, rather than to compensate the victim.

871 F.2d at 426-427 (emphasis added).

Thus, the Third Circuit has held that this Court's decision in *Kelly* was, in effect, a holding that criminal penalties are debts, even though the majority in *Kelly* stated that it was not deciding that issue, and gave ample indication that had it decided the issue it would have held them *not* to be debts.[2]

II. THE DICTA IN *KELLY* SHOULD BE ADOPTED AS THE HOLDING IN THIS CASE BECAUSE IT PROVIDES THE ONLY REASONABLE WAY TO ACCOMMODATE THE NEEDS OF THE CRIMINAL JUSTICE SYSTEM, ESTABLISHED PRINCIPLES OF FEDERALISM, AND THE POLICIES OF THE BANKRUPTCY CODE.

Amici curiae do not contend that this case is on all fours with *Kelly*. On the issues of whether criminal penalties should be considered dischargeable debts in a bankruptcy proceeding, and whether the term "debt" should be interpreted in light of the judicially created exception

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[2] As Judge Hutchinson noted below:

> The Kelly Court, however, was surely aware of [Judge Marshall's dissenting] argument. Its grave doubts as to whether criminal penalties are debts in the face of the dissent's reasoning indicates to me that restitution orders imposed as part of criminal sentences are not debts, despite the language of § 523(a)(7).

871 F.2d at 430 (Hutchinson, J., dissenting).

from such discharge, however, the cases are nearly identical. The policies which led to the creation of that judicial exception, and the fact that Congress gave no indication that it intended to eliminate that exception when it enacted the Bankruptcy Code, have not changed since 1986. Indeed, the only real difference between this case and *Kelly* is that, if the judicially created exception to discharge for criminal penalties is to survive in a Chapter 13 bankruptcy, this Court has no alternative but to take the step suggested by *Kelly* and hold that a criminal penalty is not a "debt."

Such a step is not only logical but is fully supported for all the reasons this Court pointed out in *Kelly*, albeit in dicta. Such a holding would satisfy all of the competing interests at stake. It would satisfy the "States' interest in administering their criminal justice systems free of federal interference." 479 U.S. at 49. It would maintain the principles of federalism and comity implicit in cases such as *Younger v. Harris*, 401 U.S. 37 (1971). *See Kelly*, 479 U.S. at 47. It would permit state court judges the flexibility to choose appropriate criminal sanctions. *See Kelly*, 479 U.S. at 49. And it would be consistent with bankruptcy policies of relieving *honest* debtors from the weight of oppressive economic burdens, *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), while providing no haven for criminal offenders. *See Perez v. Campbell*, 402 U.S. 637 (1971).

Conversely, if this Court affirms the court below, it will thrust the bankruptcy courts into perpetual conflict with criminal courts and the criminal justice system, thereby violating or conflicting with virtually every policy interest at stake here. Under such a holding, the

federal bankruptcy courts will be in a position to invalidate state criminal court sentences, violating " 'the fundamental policy against federal interference with state criminal prosecutions.' "[3] *Kelly*, 479 U.S. at 47, *quoting Younger v. Harris*, 401 U.S. at 46. State (and federal) criminal courts will be denied the flexibility to fashion appropriate sentences for fear that the bankruptcy courts would render much of them nugatory. *See Kelly*, 479 U.S. at 49. It will provide criminals with precisely the haven in bankruptcy that Congress and the Courts have stated is contrary to the policies of the Bankruptcy Code. *See In re Pellegrino*, 42 B.R. 129, 134 (Bkrtcy. D. Conn. 1984).

This Court considered these interests in *Kelly* and emphasized their importance. They are even more important in this case because the Third Circuit majority, in effect, has held that *all* monetary criminal penalties are dischargeable debts in Chapter 13 bankruptcy, whereas the *Kelly* decision itself focused on the more narrow issue of dischargeability of restitution orders. *See infra*, page 12.

As Judge Hutchinson states in his dissent in the court below:

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[3] As this Court noted in *Engle v. Isaac*, 456 U.S. 107, 128 (1982), "[t]he States possess primary authority for defining and enforcing the criminal law," and "[f]ederal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders."

> The interpretation . . . [of] the majority . . . is "in clear conflict with state . . . laws of great importance." *United States v. Ron Pair Enterprises, Inc.*, ___ U.S. ___, ___, 109 S.Ct. 1026, 1033, (1989).
>
> * * *
>
> The judicially created exception [for criminal penalties from discharge in bankruptcy] "reflect[s] policy considerations of great longevity and importance." *Ron Pair Enterprises, Inc.*, ___ U.S. at ___, 109 S. Ct. at 1032. The majority opinion notes that the literal terms of the Code may support the discharge of criminal judgments, but that was also true under the Bankruptcy Act of 1898. The Supreme Court has indicated to me [in *Kelly v. Robinson*] that the policy considerations and history transcend the logic of a textual analysis.

871 F.2d at 431 (Hutchinson, J., dissenting).

This Court's construction of the statute should be guided, as it was in *Kelly*, by the thoughts of Justice Frankfurter:

> "The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged

with the duty of legislating are reasonably explicit."

479 U.S. at 50, N.11, *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947).

III. BECAUSE THE DECISION BELOW HOLDS THAT CRIMINAL FINES, PENALTIES AND FORFEITURES ARE DISCHARGEABLE DEBTS, IT WILL HAVE A SIGNIFICANT ADVERSE IMPACT ON THE CRIMINAL JUSTICE SYSTEM.

A. THE THIRD CIRCUIT'S HOLDING EXTENDS TO ALL MONETARY CRIMINAL PENALTIES.

Because it focuses on the dissent in *Kelly* and relies on the language of § 523(a)(7) as its reason for holding that restitution orders are debts under the Bankruptcy Code, the Third Circuit majority decision will necessarily be interpreted as a holding that not only criminal restitution but all monetary criminal fines, penalties and forfeitures are dischargeable debts in a Chapter 13 bankruptcy.[4]

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[4] The majority begins its opinion by framing the issue presented rather narrowly:

> These consolidated appeals raise an important issue, particularly for governmental agencies engaged in public assistance, of whether criminal restitution imposed as a penalty for welfare fraud constitutes a debt dischargeable under Chapter 13 of the Bankruptcy Code.

(Continued on following page)

That this was the majority's intention is clear from the language quoted on page 7, *supra*, and other language quoted below:

> As the court determined in *Kelly*, criminal restitution obligations fall within the category of "a fine, penalty or forfeiture" under §523(a)(7). Although Congress did incorporate into Chapter 13 one of the ten exceptions under section 523(a), it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution, or any facsimile thereof. . . .Congress' considered decision to adopt only one of the section 523(a) exceptions to discharge for Chapter 13 and its concomitant failure to adopt the *criminal penalties provision* or any similar exception compels the conclusion that *such penalties, including criminal restitution*, are dischargeable under Chapter 13. *Cf. Kelly*, 479 U.S. at 50, 107 S.Ct. at 361.

871 F.2d at 428 (emphasis added).

Later on the same page, the court states:

> Here, Congress has codified the *criminal penalties* exception to discharge and has chosen not to apply the exception to Chapter 13 bankruptcy.

Id. (emphasis added). On that same page, the court also states:

(Continued from previous page)

871 F.2d at 422. There is nothing in the opinion which would limit the holding to welfare fraud cases, however, and there is ample language in the opinion which indicates that it encompasses more than restitution orders.

> We thus decline to second-guess Congress and refuse to insinuate language into its legislation excepting *criminal penalties* from the definitions of "claim" or "debt."

Id. (emphasis added).

The Third Circuit majority cites Justice Marshall's dissent in the *Kelly* case, *In re Heincy*, 78 B.R. 246 (9th Cir. BAP 1987),[5] and *In re Cullens*, 77 B.R. 825 (Bkrtcy. D. Colo. 1987), in support of its holding that criminal penalties in addition to restitution are dischargeable in a Chapter 13 bankruptcy. 871 F.2d at 426. None of those cases, however, dealt with criminal penalties other than restitution. In addition, the Bankruptcy Court decision in the case at hand contains language stating that criminal fines are dischargeable in Chapter 13, even though criminal fines were not the issue before the court. In *In re Davenport*, 83 B.R. 309 (Bkrtcy. E.D. Pa. 1988), *rev'd sub nom. Davenport* v. *Com. of Pa., Dept. of Public Welfare*, 89 B.R. 428 (E.D. Pa. 1988), the court makes the startling statement that "there is no dispute that § 1328(a) discharges criminal fines and penalties," and that "fines, penalties and forfeitures, made payable to governmental units, are made dischargeable in Chapter 13." *Id.* at 315, 316. It cites no authority, however, in support of either statement.

There is, in fact, a dispute about whether criminal fines and penalties are dischargeable in a Chapter 13 bankruptcy. Most courts which have had the precise issue before them have held that criminal fines are *not* dischargeable under Chapter 13. *See In re Norman*, 95 B.R.

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[5] Since reversed by the Ninth Circuit at 858 F.2d 548 (1988).

771 (Bkrtcy. D. Colo. 1989); *In re Ferris*, 93 B.R. 729 (Bkrtcy. D. Colo. 1988); *In re Kohr*, 82 B.R. 706 (Bkrtcy. M.D. Pa. 1988); *In re Jacobson*, 35 B.R. 40 (Bkrtcy. D. Ariz. 1986).[6] There appear to be only two decisions holding that a criminal fine is dischargeable under Chapter 13 where that issue was actually before the court. Both of those cases, *In re Gilliam*, 67 B.R. 83 (Bkrtcy. M.D. Tenn. 1986), and *In re Young*, 10 B.R. 17 (Bkrtcy. S.D. Cal. 1980), were decided prior to this Court's expression of "serious doubts whether Congress intended to make criminal penalties 'debts' within the § 101(4)." *Kelly*, 479 U.S. at 50.

B. AFFIRMANCE IN THIS CASE WILL HAMPER THE FLEXIBILITY OF CRIMINAL COURT JUDGES IN FASHIONING APPROPRIATE SENTENCES.

The Commonwealth of Pennsylvania has argued in its brief that the Third Circuit's decision as to restitution orders hampers the flexibility of state (and, presumably, federal) criminal courts by greatly reducing the effectiveness of restitution as an alternative criminal sanction. Similar arguments were made in *Kelly*, and this Court recognized in that opinion the importance of permitting criminal judges to choose the "combination of imprisonment, fines and restitution most likely to further the rehabilitative goals of state criminal justice systems."

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[6] As the majority below recognizes, the majority of courts has also rejected the contention that restitution obligations are dischargeable debts under the Bankruptcy Code. 871 F.2d at 424.

Kelly 479 U.S. at 49. This Court also specifically recognized the effectiveness of restitution as a rehabilitative tool. *Id.* at 49, fn. 10. Fines, forfeitures and other monetary criminal penalties also are effective and valuable tools in meting out appropriate punishment to criminal offenders. They serve the traditional purposes of punishment – deterrence, retribution, and rehabilitation. *See United States v. Brown*, 744 F.2d 905, 909 (2nd Cir.), *cert. denied*, 469 U.S. 1089 (1984). The Third Circuit's decision hampers the usefulness of all such tools, including restitution.

In fact, because the decision below makes dischargeable all monetary criminal penalties, it leaves the courts with incarceration as the only available criminal sanction which cannot be defeated by the bankruptcy courts. Clearly, this result hampers judges in fashioning appropriate sentences in criminal cases. But it does even more. Ironically, by diminishing the value of monetary penalties as criminal sanctions, the ruling below may actually subvert the goals of the federal bankruptcy laws. The purpose of the Bankruptcy Code is to relieve persons who are being crushed by their debts and to provide them a "fresh start" in life. *See, Perez v. Campbell*, 402 U.S. 637 (1971). If the States are forced to jail criminals because they could nullify monetary sanctions simply by filing for bankruptcy, those offenders would have less opportunity to obtain the "fresh start" that the Code is intended to provide.

C. THE EFFECTS ON THE CRIMINAL JUSTICE SYSTEM WILL NOT BE LIMITED TO HAMPERING THE CRIMINAL COURTS IN SENTENCING.

It is quite likely that criminal offenders will file for bankruptcy if they can thereby discharge criminal penalties. The impact on the criminal justice system, and the public confidence in that system, is quite predictable if such filings become commonplace. Criminal courts will be forced to consider incarceration as the only effective penalty, even for lesser offenses, and prisons will become even more crowded. Indeed, overcrowded prisons may prevent increased use of incarceration. The public will lose even more confidence in the ability of the criminal justice system to punish criminals effectively if incarceration cannot be imposed and criminal fines and restitution can be so easily circumvented.[7]

The prospect that criminals will seek refuge in Chapter 13 bankruptcies to avoid criminal penalties is quite real. Under our system of criminal justice, an attorney has

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[7] There may be some question about the ease of discharging fines and other criminal penalties in a Chapter 13 case. In *In re Gilliam* and *In re Young*, the two cases which held criminal fines dischargeable under Chapter 13, the debtors' plans provided for 100% payment of the fines. That is not the usual case, however. As Judge Woodside stated in *In re Kohr*: "The majority of Chapter 13 cases are filed to save the home. Most provide very small payments to unsecured creditors. I have approved plans with no payments going to unsecured creditors. The strong principals enunciated in the *Kelly* case are totally inconsistent with the discharge of criminal penalties in a Chapter 13 case." *In re Kohr*, 82 B.R. at 712.

an ethical obligation to provide his client with competent legal counsel. Arguably, criminal lawyers will be bound to advise their clients of the availability of relief from criminal sanctions in the bankruptcy courts if this Court affirms the Third Circuit's decision. A lawyer might even be accused of malpractice if he did not put his client into Chapter 13 bankruptcy upon the imposition of a large fine or restitution order by a criminal court.

As a result of such a situation, Chapter 13 bankruptcy filings could become the norm for convicted criminals who are the subject of a fine or restitution order. The bankruptcy courts would become an adjunct to the criminal justice system: The last stop in a progression from arrest, trial, conviction, sentencing, bankruptcy filing and then discharge. There is every reason to believe that resourceful attorneys would use the system in just that way, creating a "revolving door" by which criminals could rid themselves of criminal penalties. *See In re Pellegrino*, 42 B.R. 129, 138 (Bkrtcy. D. Conn. 1984). That this result is contrary to Congress' intent that bankruptcy not become a haven for criminals is self-evident. *Id.* at 134. This Court should not presume that Congress intended such an absurd result. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

D. THE EFFECTS WILL BE FELT BY PROSECUTORS AND OTHER STATE OFFICIALS ATTEMPTING TO ENFORCE CRIMINAL SENTENCES.

If criminal penalties are held to be dischargeable debts, prosecutors likely will have to become bankruptcy practitioners, attempting to convince bankruptcy courts

that a debtor's Chapter 13 plan should not be confirmed or that criminal penalties deserve special treatment in the plan. This is unlike the situation in *Kelly*, where prosecutors arguably could have objected to discharge for many types of criminal sentences because a Chapter 7 bankruptcy was involved. In Chapter 13 cases, state officials presumably will be limited to objections to plan confirmation or objections to the treatment of the criminal penalty under the plan.[8] If criminal penalties are not excepted from discharge in Chapter 13, there is very little else that is excepted upon which an objection could be fashioned. For this reason, once again, the policy reasons for construing criminal penalties as not within the definition of "debt" are even stronger in this case than in *Kelly*.

IV. THE EXCEPTION TO THE AUTOMATIC STAY IN § 362(b)(1) CONFLICTS WITH A DECISION THAT CRIMINAL PENALTIES ARE DISCHARGEABLE IN CHAPTER 13.

The exception to the automatic stay in § 362(b)(1) creates yet another direct conflict between the criminal

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[8] Filing such objections and following bankruptcy proceedings would create uncertainties and impose undue burdens on state officials, as noted by this Court in *Kelly*. 479 U.S. at 48. This is especially true where bankruptcy proceedings may be filed in jurisdictions far from the state where the criminal sentence was imposed. If a convicted criminal has moved to another state and filed for bankruptcy in that state, the ability of officials from the state of conviction to monitor and have an effect on the bankruptcy proceeding is very limited. Moreover, bankruptcy practice is a specialty requiring a good deal of expertise. Placing the burden of enforcing criminal sentences in bankruptcy courts on prosecutors and criminal justice personnel would be both unduly burdensome and inappropriate.

justice system and the bankruptcy courts if this Court affirms the court below. The conflict arises because of the authority of prosecutors or other state officials, acting pursuant to the exception to the automatic stay, to institute collection measures to enforce fines and criminal penalties outside of a Chapter 13 plan, either by filing an adversary proceeding seeking to have the stay lifted, or by simply proceeding with collection efforts with the understanding that the stay does not apply.

The exception to the automatic stay in § 362(b)(1) is for "the commencement or continuation of a criminal action or proceeding against the debtor." Although this Court has not expressly ruled on the question, at least one circuit has held that this provision means that the automatic stay provisions of § 362 do not apply to attempts to collect a criminal fine. *United States v. Troxler Hosiery Co., Inc.*, 41 B.R. 457 (D.C. N.C. 1984), *aff'd, per curiam*, 796 F.2d 723 (4th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987). *See also In re Wise*, 25 B.R. 440 (Bkrtcy. E.D. Va. 1982); *In re Newton*, 15 B.R. 708 (Bkrtcy. N.D. Ga. 1981); *In re Button*, 8 B.R. 692 (Bkrtcy. W.D. N.Y. 1981). *Cf. In re Cancel*, 85 B.R. 677 (N.D. N.Y. 1988).

It would be completely inconsistent for Congress to have provided that fines and penalties are dischargeable debts in a Chapter 13 bankruptcy while also providing that efforts to collect such penalties during the period prior to discharge are not stayed. It would make little sense if the government could collect, outside of a Chapter 13 plan, a debt which is dischargeable upon completion of the plan. Such collection, unless somehow allowed for in the plan, would likely limit the debtor's ability to complete the plan. In fact, a prosecutor armed with an

exemption from the stay could presumably have the individual incarcerated, thereby eliminating any possibility that he could complete his plan. At a minimum, the prosecutor certainly would have an incentive to work quickly to collect penalties before completion of the plan, since there could be no collection after discharge.

Accordingly, the exception to the stay provided in § 362(b)(1) is yet another reason for this Court not to interpret criminal penalties as dischargeable debts. Congress cannot have intended to create such an inconsistency, and it would be inappropriate for this Court to hold that it did where there is an alternative interpretation available which avoids that result while remaining consistent with legislative purposes. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

CONCLUSION

The statutory interpretation by the majority below forces the criminal courts and bankruptcy courts into conflict, contravenes basic concepts of federalism, and threatens the effectiveness of the criminal justice system at both the state and federal levels. An alternative interpretation which has none of those faults and which is consistent with legislative purposes is available *See Griffin, supra*, 458 U.S. at 575. It is not only available, it has been described by this Court in *Kelly v. Robinson*. There is every reason to adopt that alternative interpretation in this case.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted by the
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